

PRE
SUPREME COURT U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 68

T.I.M.E. INCORPORATED, PETITIONER,

30.

UNITED STATES OF AMERICA,

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

**PETITION FOR CERTIORARI FILED MAY 24, 1958
CERTIORARI GRANTED OCTOBER 12, 1958.**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 68

T.I.M.E. INCORPORATED, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

Civil Action No. 1757

T.I.M.E., INCORPORATED,

vs.

UNITED STATES OF AMERICA.

FIRST AMENDED ORIGINAL COMPLAINT—

Filed January 30, 1956

To the Honorable Court:

Now comes Complainant, T.I.M.E., Incorporated and with leave of the Court, files this its First Amended Original Complaint, and hereby brings this suit against the United States of America as Defendant suing for unpaid transportation charges on shipments of freight which were transported by the Complainant at the special instance and request of the Defendant, Complainant allèges:

I.

Complainant is a corporation organized under the laws of Delaware, but having its principal office and place of [fol. 7] business in Lubbock, Texas, which is within the territorial limits of the Lubbock Division of the United States District Court for the Northern District of Texas. Complainant corporation is a resulting merger of The Intercity Motor Express, Inc., a Texas Corporation, and the Southwestern Freight Lines, a California Corporation, under authority of the Interstate Commerce Commission in its Docket No. MC-F-5353. As a result of such merger,

this Complainant acquired all of the assets and assumed all of the liabilities of the two predecessor corporations, and for all purposes herein, "Complainant" shall be used to refer to this Complainant and its predecessors in interest.

II.

This Court has jurisdiction of this cause under authority of Title 28, Section 1346, USCA, in that this is a suit for a debt arising under an express contract, to-wit, the carriage of freight by Complainant for the United States Government and the amount involved is less than \$10,000.00, to-wit, \$379.51.

III.

That Complainant is a Common Carrier Motor Carrier operating under authority of the Interstate Commerce Commission under its Certificate No. MC 35320, and related subdivisions. That it operates generally between Memphis, Tennessee on the one hand and Los Angeles, California on the other hand, via Little Rock and Fort [fol. 8] Smith, Arkansas; Oklahoma City, Marian (Tinker Field), Oklahoma; Lubbock, Odessa, Pyote, and El Paso, Texas; Hobbs, New Mexico; and Tucson, Phoenix, Arizona; and Los Angeles, California. And Complainant, as such, has been operating for a period of over ten years.

At the special instance and request of the Defendant, this Complainant moved various and sundry freight shipments for the Defendant. The exact date, points of origin and commodities transported are shown in detail and specifically in government bills of lading executed by the Defendant and after the transportation service was performed and accomplished, said original government bills of lading were turned over to the Defendant. Such bills of lading are set forth in Exhibit A, attached hereto and made a part hereof, and of which the Defendant has full and complete knowledge.

That as a part of the contract of carriage, the Defendant agreed to pay the lawful tariff rates and charges as on file with the Interstate Commerce Commission on the respective dates of the movement of the shipments.

IV.

That as set forth in Exhibit A; in accordance with the bills of lading numbers as contained in said Exhibit, being a column designated as "GBL No. --", this Complainant has filed certain overcharge claims with the Defendant, upon these movements, to which the Defendant has as [fol. 9] signed the numbers as shown in the second column under the heading "Government Claim". The amounts due this Complainant are set forth in the third column under the heading "Amount". The Defendant has recognized and paid a portion of said claims as set forth in said Exhibit under the column "Amount of Claim GAO has paid T.I.M.E.". Under the column designated as "GAO Owes T.I.M.E." there is listed the balance of the amounts the Defendant owes to this Complainant, which totals the sum of \$14,414.82.

That the shipments set forth in Exhibit A moved from Tinker Air Force Base designated as Marian, Oklahoma to McClellan Air Force Base, Planehaven, California.

That the lawful rate and charges due upon said shipment are reflected in Item No. 32810, National Motor Freight Classification No. 9, MF-ICC-No. 17; and Item No. 405, Rocky Mountain Motor Transcontinental Class Tariff No. 5-A, MF-ICC-No. 31, which is the only and sole lawful rate on file with the Commission at the time of the movement of said shipments and represents the lawful and correct charge for such services. This Defendant, on the other hand, through its General Accounting Office, herein designated as GAO, contends that the lawful rate would be a rate based on a combination of rates over El Paso, Texas from point of origin to El Paso, Texas and from El Paso, Texas to destination and refuses to pay the legal and lawful rate and has declined and refused to pay the [fol. 10] claims as set forth in Exhibit A. And that by virtue thereof, the Defendant became indebted to this Complainant in the amount of \$14,414.82.

V.

That by virtue of other freight movements the GAO deducted various amounts from freight charges otherwise

due this Complainant unlawfully and without authority in the amount of \$2,242.58 and that by virtue thereof and the account set forth in Exhibit A, the Defendant became liable to this Complainant in the amount of \$16,657.40, for which the Defendant is entitled to credit of \$16,277.89, leaving a balance due Complainant in the amount of \$379.51.

Wherefore, premises considered, Complainant prays the Court that it have judgment for its debt in the sum of \$379.51, and that Complainant have judgment for its costs and for such other and further orders as may be just and equitable, for which the Complainant will ever pray.

Respectfully submitted,

Benson & Howard, 817 Lubbock National Building,
Lubbock, Texas, Attorneys for Complainant, By:
[fol. 11] /s/ W. D. Benson Jr., Of Counsel.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER, COUNTERCLAIM AND CROSS ACTION—
Filed January 30, 1956

Comes now United States of America, defendant in the above numbered and entitled cause, acting herein by and through its duly authorized United States Attorney for the Northern District of Texas, and in reply to plaintiff's first amended original complaint and by way of counterclaim against plaintiff would respectfully show the following:

First Defense

1.

Paragraph 1 of the complaint is admitted.

2.

The jurisdiction of the Court is admitted except insofar as a determination of the reasonableness of any rate may be required.

[fol. 12]

3.

Paragraph 3 of the complaint is admitted except for the allegations in the last paragraph thereof which is denied. It is admitted that defendant agreed to pay any charges legally due.

4.

(a) The first paragraph of Section 4 of the complaint is admitted except insofar as it alleges it owes plaintiff the sum of \$14,414.82, which is denied.

(b) The second paragraph of Section 4 of the complaint is admitted.

(c) The third paragraph of Section 4 of the complaint is denied.

5.

Paragraph 5 of the complaint is denied.

Second Defense

Defendant alleges that the rate presently chargeable for the shipments set forth in Exhibit A is one based on a combination of rates to and from El Paso, Texas; that the lawful charges are those already paid to plaintiff by defendant; and that defendant owes plaintiff nothing for these transportation services.

[fol. 13]

Third Defense

Defendant further says that should the Court find that the rate asserted by plaintiff is applicable on the sum shown on plaintiff's Exhibit A, then such rate is *prima facie* unreasonable, and, therefore, unlawful, to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso, Texas; that the Interstate Commerce Commission has jurisdiction to determine the reasonableness of interstate freight rates, and that this Honorable Court should defer judgment in this case for a reasonable period of time to permit defendant to file a complaint with the Interstate Commerce Commission and obtain a finding as to the reasonableness of such rate.

Defendant's Counterclaim Against
T.I.M.E., Inc.

Comes now United States of America, acting herein by and through its duly authorized United States Attorney for the Northern District of Texas, and by way of cross action against T.I.M.E., Inc., plaintiff herein, would respectfully show the following:

1.

The Court has jurisdiction of this cross action because the claim asserted herein is one on behalf of the United States of America.

[fol. 14]

2.

That T.I.M.E., Inc. is indebted to the United States of America in the sum of \$17,657.37 by virtue of, said overpayments on shipments made by the government and transported by T.I.M.E., Inc. These shipments and overcharges are set out and described in defendant's Exhibit A which is attached hereto and made a part hereof. In the first column is shown the item number of the exhibit; the second column shows T.I.M.E.'s number of the overcharge; the third column shows the bill of lading and GAO file reference; the fourth column shows the amount of overpayment claimed to have been made by the government and the last column shows the amount T.I.M.E. agrees that it owes.

That the United States of America has paid to T.I.M.E. Inc. the figure set out in the fourth column captioned "Amount Claimed by the United States".

Wherefore, defendant prays that plaintiff take nothing by its suit and that it go hence with its costs without day and that it have judgment over and against plaintiff in the sum of \$17,657.37, for costs of suit and for such other and further relief to which defendant may be entitled and in duty bound will ever pray.

United States of America, Heard L. Floore, United
[fol. 15] States Attorney, /s/ John A. Lowther,
Assistant United States Attorney.

EXHIBIT "A" TO DEFENDANT'S ANSWER, ETC.

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
1	OC-93-54	A56205 5/48 SEB	222.03	222.03
2	OC-96-54	AS1380 11/51 SEB	651.64	651.64
3	OC-97-54	A91174 10/51 SEB	71.38	71.38
4	OC-99-54	A972 7/51 SEB	252.91	252.91
5	OC-102-54	A195813 3/51 SEB	146.25	146.25
6	OC-105-54	A95641 11/50 SEB	69.51	69.51
7	OC-465-4	A199921 3/51 SEB	101.71	101.71
8	OC-467-4	A192984 3/51 SEB	25.97	25.97
9	OC-172-54	A283685 5/51 SEB	348.49	348.49
10	OC-174-54	A4416 7/51 SEB	101.49	101.49
11	OC-206-54	A76716 10/49 SEB	116.22	116.22
12	OC-253-4	A259701 3/51 SEB	377.26	377.26
13	OC-258-54	A179408 2/52 SEB	98.46	98.46
14	OC-269-54	A118473 12/51 SEB	116.12	116.12
15	OC-352-54	A66381 11/51 SEB	195.91	195.91
16	OC-394-54	A5718 7/49 PDE	33.79	33.79
17	OC-398-4	A251175 5/50 SEB	440.39	440.39
18	OC-399-4	A16489 3/50 SEB	776.51	776.51
19	OC-401-4	A317433 6/51 SEB	52.56	52.56
20	OC-402-4	A71436 10/50 SEB	63.60	63.60
21	OC-406-4	A191432 5/5 JEL	14.96	14.96
22	OC-409-4	A260307 5/51 SEB	344.51	344.51
23	OC-411-4	A61249 8/51 SEB	290.33	290.33
24	OC-412-4	A2361 9/51 SEB	64.47	64.47
25	OC-415-4	A82803 11/51 SEB	16.10	16.10
26	OC-417-4	RALL640 7/43 HALE	58.40	58.40
27	OC-418-4	A231248 4/50 SEB	778.97	778.97
28	OC-419-4	A210574 3/51 SEB	21.32	21.32
29	OC-422-4	A161422 1/51 SEB	306.84	306.84
30	OC-424-4	A181151 2/51 SEB	154.80	154.80
[fol. 16]				
31	OC-425-4	A122949 12/50 SEB	308.69	308.69
32	OC-434-4	18344 7/51 SEB	34.83	34.83
33	OC-435-4	A292493 5/51 SEB	19.14	19.14
34	OC-436-4	260313 5/51 SEB	142.40	142.40
35	OC-437-4	A260309 5/51 SEB	49.18	49.18
36	OC-438-4	A305964 6/51 SEB	283.11	283.11

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
37	OC-439-4	A140843 1/51 SEB	582.27	582.27
38	OC-474-4	A223657 3/51 SEB	101.88	18.27
39	OC-475-4	A296138 5/51 SEB	191.62	191.62
40	OC-479-5	A161423 1/51 SEB	257.74	257.74
41	OC-483-4	A119297 12/50 SEB	57.72	57.72
42	OC-484-4	A175270 2/51 SEB	376.59	376.59
43	OC-527-4	A214581 2/52 SEB	142.95	142.95
44	OC-543-4	A73865 10/50 SEB	328.66	328.66
45	OC-559-4	A198096 3/49 SEB	30.54	30.54
46	OC-560-4	A296643 1/49 SEB	22.56	22.56
47	OC-691-4	A243022 3/52 SEB	109.45	109.45
48	OC-705-4	A225280 3/52 SEB	332.29	332.29
49	OC-757-4	A82803 11/51 SEB	93.05	93.05
50	OC-760-4	A153001 1/52 SEB	172.99	172.99
51	OC-815-4	A229382 3/52 SEB	80.92	80.92
52	OC-1087-4	A58810 11/50 SEB	333.93	333.93
53	OC-1089-4	A304648 8/51 SEB	46.19	46.19
54	OC-1090-4	A8089 9/51 SEB	205.14	205.14
55	OC-1091-4	A294258 5/51 SEB	312.49	312.49
56	OC-1095-4	A79611 10/51 SEB	14.62	14.62
57	OC-1098-4	A118433 12/51 SEB	19.68	19.68
58	OC-1157-4	A70271 11/51 SEB	456.82	456.82
59	OC-1167-4	A230205 4/51 SEB	97.03	97.03
60	OC-1171-4	A79447 11/51 SEB	92.58	92.58
61	OC-1221-4	A236519 5/52 JEL	728.06	728.06
62	OC-1259-4	A247365 6/52 JEL	131.58	131.58
63	OC-1260-4	A333590 5/52 SEB	69.17	69.17
66	OC-1331-4	A278166 4/52 SEB	504.45	504.45
67	OC-1332-4	A152072 1/52 SEB	308.38	308.38
68	OC-1520-4	A57612 8/52 JLW	449.72	449.72
69	OC-1521-4	A305983 5/52 SEB	713.74	82.03
[fol. 17]				
70	OC-1524-4	A305981 5/52 SEB	146.46	146.46
71	OC-1525-4	A118470 12/51 SEB	35.60	35.60
72	OC-1531-4	A21277 7/52 JLW	69.96	69.96
73	OC-1534-4	A74453 9/52 JLW	299.88	299.88
74	OC-1574-4	A233784 3/52 SEB	20.75	20.75
75	OC-1575-4	A266039 4/52 SEB	169.73	169.73
76	OC-1623-4	A9868 7/52 JLW	102.64	102.64

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount	
				9/52 JLW	23.20
77	OC-1624-4	A95946	9/52 JLW	23.20	23.20
78	OC-1537-4	A287271	4/52 SEB	59.83	59.83
79	OC-1566-4	A279920	4/52 SEB	110.09	110.09
80	OC-1567-4	A47907	6/52 JLW	22.37	22.37
81	OC-1565-4	A282424	4/52 SEB	618.10	618.10
82	OC-1564-4	A271740	4/52 SEB	506.48	506.48
83	OC-1522-4	A212010	2/52 SEB	957.22	957.22
			TOTALS	17,657.37	16,942.03

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—January 30, 1956

Now comes plaintiff, T.I.M.E., Inc. by its attorney of record and now comes defendant, United States of America, by its attorney of record and submits the issues involved in this case to the Court upon stipulated facts as follows:

[fol. 18]

1.

T.I.M.E., Inc., at all times germane to the issues herein was a common carrier motor carrier operating generally between Oklahoma City, Oklahoma, and Los Angeles, California, via El Paso, Texas, under authority of the Interstate Commerce Commission under Certificate No. 35320.

2.

All freight moving, herein involved, moved by T.I.M.E., Inc. or through its connecting lines for such movement the defendant was due to pay the legal or lawful tariff charges.

3.

It is stipulated and agreed as to the items contained in complainant's Exhibit A that all were movements of Scientific Instruments NOI and that the determination of an illustrative shipment will determine the issues with

respect to the other shipments in Exhibit "A". It is agreed that a typical shipment is as follows:

That the shipment moved on government bill of lading WW 8173298. The origin of the shipment was Tinker Air Force Base, Marion, Oklahoma, destination McClellan Air Force Base, Planehaven, California. This shipment was moved by T.I.M.E. and its connecting line from Marion, Oklahoma (Tinker Air Force Base), via El Paso, Texas, [fol. 19] to Planehaven, California (McClellan Air Force Base). The weight of the shipment was 14,400 pounds.

That at the time of the movement of this freight there was on file with the Commission among others, the following provisions:

Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-I.C.C. No. 31. Therein a through rate was named from Marion, Oklahoma, to Planehaven, California in the amount of \$10.74 per cwt., which is double first class.

There also appeared a rate in Southwestern Motor Freight Bureau Tariff No. 1-F, M.F.-I.C.C. No. 141 naming a rate from Marion, Oklahoma, to El Paso, Texas, at \$2.56 per cwt.

There was also on file a rate that appeared in Interstate Freight Carriers Conference Tariff No. 1-C, M.F.-I.C.C. No. A-5 naming a rate of \$4.35 per cwt. from El Paso, Texas, to Planehaven, California.

Rocky Mountain Motor Tariff No. 5-A reads as follows:

405. Application of Volume Rates on Articles Rated Higher Than First Class

"Volume rates named in this tariff will not apply on any article carrying an LTL rating of higher than first class in the current classification. On [fol. 20] all such articles rates based on the LTL ratings in the classification will be the only class rates applicable."

The official issue of the Interstate Commerce Commission, Tariff MF-3, Rule 4 (i) which reads:

"(i) When a carrier or carriers establish a local or joint rate for application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route."

It is further stipulated that Southwestern Motor Freight Bureau tariffs do not name a rate between Marion, Oklahoma, on the one hand and between Planehaven, California, on the other hand. That the Interstate Freight Carriers Conference tariffs do not name a rate between Marion, Oklahoma, and Planehaven, California. That the Rocky Mountain Freight Bureau tariffs name a through rate between Marion, Oklahoma, and Planehaven, California, but does not name a rate between Planehaven, California and El Paso, Texas, or between Marion, Oklahoma, and El Paso, Texas.

T.I.M.E. contends that the rate appearing in Rocky Mountain Tariff Bureau, Tariff No. 5-A, naming a rate of \$10.74 per cwt. applies (the through rate). The defendant on the other hand, contends that the combination [fol. 21] of local or intermediate rates from Marion, Oklahoma, to El Paso, Texas, and from El Paso, Texas, to Planehaven, California, applies.

If the Court should determine that the through rate as contended by T.I.M.E. applies, the computation of Exhibit "A" in the amount of \$14,414.82 is correct. On the other hand, if the Court should determine that the combination of local rates apply, then the defendant is not indebted to T.I.M.E. in any amount on these items.

It is a further position of the defendant that if this Court, after hearing of this cause, should determine that the rate applicable on these shipments is the rate contended for by the plaintiff, then it is the contention of defendant that such rate is "prima facie" unreasonable and therefore, unlawful to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso, Texas. The defendant contends, in this event, that the Court should defer judgment in this case for a reasonable

time to enable defendant to file a complaint with the Interstate Commerce Commission and obtain a finding as to the reasonableness or unreasonableness of the rate.

With reference to the latter position of the defendant, it is the contention of T.I.M.E. that there is only one legal lawful rate named in the tariffs, to wit, the rate named in the Rocky Mountain Motor Tariff Bureau No. 5-A. That the remedy of the defendant, if any, was at the time the [fol. 22] tariff rate was filed or the issue raised at a prior time by a complaint before the Commission. Complaining of the rate at this time the Court is without jurisdiction to determine, and the Court is without jurisdiction to defer or remand the decision of the reasonableness of the existing rate to the Commission at this time.

Defendant's Counterclaim

With regard to the items contained in defendant's counterclaim as more specifically described in Exhibit "B" attached hereto, there are only the following items in dispute.

I. Item No. 38 of Exhibit "B", which were billed in the original government bill of lading as:

"Domes, Airplanes, Cellulose, Derivative, Plastic, and Metal Combined."

That there appears under Item 120, Rocky Mountain Motor Tariff Bureau No. 5-A, M.F.-I.C.C. No. 31 which reads:

"Airplane parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates."

There also appears the following:

Rule 15, National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1 which reads:

[fol. 23] "COMBINATION ARTICLES when not specifically classified, articles which have been combined or attached to each other will be charged at the rating for highest classed article of the combination, and ship-

ments subject to volume on truck load rating, the minimum weight in which the highest minimum weight providing for such highest rating, where the volume or truck load ratings, are the same, the minimum weight will be the highest for any article in the combination."

There also appears in National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1, Item No. 2700 which reads:

"Aircraft parts, NOI, other than cloth and wood or metal combined in boxes or crates—."

It is the contention of T.I.M.E. that Item 120 combined with Rule 15 covers the rate to be charged.

The defendant, on the other hand, contends that Item 2700 fixes the rates to be charged. That Item 120 is described in the tariff as an exception to the current classification. Defendant contends that since the rating claimed applicable by the plaintiff is described in the tariff as an exception to the current classification that the article must be classified in that tariff, and that if that be so, then [fol. 24] Rule 15 is not applicable because the rule is predicated on the articles not being classified in the classification.

2. Item No. 69 of Exhibit "B", ailerons, described in the bill of lading as, "8 boxes aircraft ailerons" weighing 15,380 pounds.

National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1, Item 2940 reads:

"Wing panels or sections; in boxes or crates—."

National Motor Freight Classification No. 11, M.F.-I.C.C. No. 1, Item 2690 reads:

"Aircraft parts, NOI, cloth or wood and metal combined in boxes or crates."

Also Rocky Mountain Motor Tariff Bureau U. S. Government Quotation No. 43-A provides:

"Freight, all kinds except as provided in Note 1 below:

Note 1.—The rates named do not apply on the following articles:

Airplanes.

Airplane Parts, viz.: Airplanes with power taken apart; boats or pontoons; bomb bay doors; cowls; ele-
[fol. 25] vators; fuselage, with or without power installed; gliders, other than glider kits; gun turrets; nacelles; plastic domes; rubber fuel cells or tanks; rudders or stabilizers; seats, set-up; wing flaps, panels or sections; wings."

T.I.M.E. contends that an aileron is actually a wing panel or section.

On the other hand, the defendant contends that ailerons should be classed as Aircraft Parts, NOI, cloth or wood and metal combined, as they are not wing sections or panels.

Dated this the 30th day of January, 1956.

Benson and Howard, By: /s/ W. D. Benson, Jr.,
Attorneys for Plaintiff.

Heard L. Floore, United States Attorney, /s/ John
A. Lowther, Assistant United States Attorney,
Attorneys for Defendant.

[fol. 26]

EXHIBIT "A" TO STIPULATION OF FACTS

1.	2.	3.	4.	5.	6.	7.	8.
Item No.	Government Bill of Lading No.	Original G.A.O. No.	G.A.O. No. Under Which Settled	Amount Claimed by T.I.M.E.	Amount of T.I.M.E. Claim Paid by Gov't.	Unpaid Balance of T.I.M.E. Claim	Government Certificate of Settlement (or Voucher)
1	WW-8173298	TK-313204	TK-313204	\$ 773.28	C-\$ 221.76	\$ 551.52	507589 6/ 5/51
2	WW-8173291	TK-313205	TK-312349	903.77	S- 259.18	644.59	533239 1/10/52
3	WW-8173873	TK-313214	TK-313214	1122.76		1122.76	
4	AF-116488	TK-313213	TK-313213	159.41	C- 159.41		509697 7/12/51
5	WW-8687278	TK-314018	TK-314018	596.14	C- 153.59	442.55	507691 6/ 5/51
6	WW-8173806	TK-314129	TK-313209	1275.48	S- 348.55	926.93	602569 3/30/54
7	WW-8175568	TK-314019	TK-314019	2237.46	C- 641.66	1595.80	507692 6/ 6/51
8	WW-8174787	TK-314021	TK-312349	958.01	S- 274.73	683.28	248953 3/16/54
9	WW-8175189	TK-314020	TK-314020	1851.58	C- 444.97	1406.61	507693 6/ 1/51
10	WW-8687956	TK-313968	TK-313968	602.62	C- 210.83	391.79	521165 9/26/51
11	WW-8174421	TK-314022	TK-314022	672.65	C- 192.90	479.75	507694 6/ 5/51
12	WW-817532	TK-318639	TK-318639	635.38		635.38	
[fol. 27]							
13	WW-8173561	TK-313209	TK-313208	1923.54	C- 275.81		509696 7/10/51
					C- 961.77	685.96	Vou-264821
							5/49-S.E.B.

1.	2.	3.	4.	5.	6.	7.	8.
Item No.	Government Bill of Lading No.	Original G.A.O. No.	G.A.O. No. Under Which Settled	Amount Claimed by T.I.M.E.	Amount of T.I.M.E. Claim Paid by Gov't.	Unpaid Balance of T.I.M.E. Claim	Government Certificate of Settlement (or Voucher)
14	WW-8173119	TK-313206	TK-313206	1007.95	C- 309.18	698.77	521044 9/21/51
15	WW-8173636	TK-313211	TK-313210	1042.85	C- 299.07	743.78	507690 6/ 4/51
16	WW-8173691	TK-313212	TK-313212	959.08		959.08	
17	WW-8173446	TK-313208	TK-313209	750.19	S- 215.14	535.05	602569 3/30/54
18	WW-8173585	TK-313210	TK-313210	889.27	C- 255.03	634.24	507690 6/ 4/51
19	WW-8173437	TK-313207	TK-312349	765.76	S- 219.61	546.15	785990 1/22/52
20	WW-8173671	TK-312349	TK-312349	1024.70	C- 293.87	730.83	507688 6/ 1/51
TOTALS				\$20151.88	\$5737.06	\$14414.82	

TOTAL UNPAID BALANCE OF T.I.M.E. CLAIM—\$14,414.82

**Explanation of Symbols
in Volume No. 6:**

C—Paid in Cash

**S—Allowed but used as set-off
against overpayments on other
shipments.**

[fol. 28]

EXHIBIT "B" TO STIPULATION OF FACTS

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
1	OC-93-54	A56205 5/48 SEB	222.03	222.03
2	OC-96-54	AS1380 11/51 SEB	651.64	651.64
3	OC-97-54	A91174 10/51 SEB	71.38	71.38
4	OC-99-54	A972 7/51 SEB	252.91	252.91
5	OC-102-54	A195813 3/51 SEB	146.25	146.25
6	OC-105-54	A95641 11/50 SEB	69.51	69.51
7	OC-465-4	A199921 3/51 SEB	101.71	101.71
8	OC-467-4	A192984 3/51 SEB	25.97	25.97
9	OC-172-54	A283685 5/51 SEB	348.49	348.49
10	OC-174-54	A4416 7/51 SEB	101.49	101.49
11	OC-206-54	A76710 10/49 SEB	116.22	116.22
12	OC-253-4	A259701 3/51 SEB	377.26	377.26
13	OC-258-54	A179408 2/52 SEB	98.46	98.46
14	OC-269-54	A118473 12/51 SEB	116.12	116.12
15	OC-352-54	A66381 11/51 SEB	195.91	195.91
16	OC-394-54	A5718 7/49 PDB	33.79	33.79
17	OC-398-4	A251175 5/50 SEB	440.39	440.39
18	OC-399-4	A16489 3/50 SEB	776.51	776.51
19	OC-401-4	A317433 6/51 SEB	52.56	52.56
20	OC-402-4	A71456 10/50 SEB	63.60	63.60
21	OC-406-4	A191432 5/5 JEL	14.96	14.96
22	OC-409-4	A260307 5/51 SEB	344.51	344.51
23	OC-411-4	A61249 8/51 SEB	290.33	290.33
24	OC-412-4	A2361 9/51 SEB	64.47	64.47
25	OC-415-4	A82803 11/51 SEB	16.10	16.10
26	OC-417-4	RALL640 7/43 HALE	58.40	58.40
27	OC-418-4	A231248 4/50 SEB	778.97	778.97
28	OC-419-4	A210574 3/51 SEB	21.32	21.32
29	OC-422-4	A161422 1/51 SEB	306.84	306.84
30	OC-424-4	A181151 2/51 SEB	154.80	154.80
31	OC-425-4	A122949 12/50 SEB	308.69	308.69
32	OC-434-4	18344 7/51 SEB	34.83	34.83
33	OC-435-4	A292493 5/51 SEB	19.14	19.14
34	OC-436-4	260313 5/51 SEB	142.40	142.40

[fol. 29]

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount
35	OC-437-4	A260309 5/51 SEB	49.18	49.18
36	OC-438-4	A305964 6/51 SEB	283.11	283.11
37	OC-439-4	A140843 1/51 SEB	582.27	582.27
38	OC-474-4	A223657 3/51 SEB	101.88	18.27
39	OC-475-4	A296138 5/51 SEB	191.62	191.62
40	OC-479-5	A161423 1/51 SEB	257.74	257.74
41	OC-483-4	A119297 12/50 SEB	57.72	57.72
42	OC-484-4	A175270 2/51 SEB	376.59	376.59
43	OC-527-4	A214581 2/52 SEB	142.95	142.95
44	OC-543-4	A73865 10/50 SEB	328.66	328.66
45	OC-559-4	A198096 3/49 SEB	30.54	30.54
46	OC-560-4	A296643 1/49 SEB	22.56	22.56
47	OC-691-4	A243022 3/52 SEB	109.45	109.45
48	OC-705-4	A225280 3/52 SEB	332.29	332.29
49	OC-757-4	A82803 11/51 SEB	93.05	93.05
50	OC-760-4	A153001 1/52 SEB	172.99	172.99
51	OC-815-4	A229382 3/52 SEB	80.92	80.92
52	OC-1087-4	A58810 11/50 SEB	333.93	333.93
53	OC-1089-4	A304648 8/51 SEB	46.16	46.16
54	OC-1098-4	A5089 9/51 SEB	205.14	205.14
55	OC-1091-4	A294258 5/51 SEB	312.49	312.49
56	OC-1095-4	A79611 10/51 SEB	14.62	14.62
57	OC-1098-4	A118433 12/51 SEB	19.68	19.68
58	OC-1157-4	A70271 11/51 SEB	456.82	456.82
59	OC-1167-4	A230205 4/51 SEB	97.03	97.03
60	OC-1171-4	A79447 11/51 SEB	92.58	92.58
61	OC-1221-4	A236519 5/52 JEL	728.06	728.06
62	OC-1259-4	A247365 6/52 JEL	131.58	131.58
63	OC-1260-4	A333590 5/52 SEB	69.17	69.17
66	OC-1331-4	A278166 4/52 SEB	504.45	504.45
67	OC-1332-4	A152072 1/52 SEB	308.38	308.38
68	OC-1520-4	A57612 3/52 JLW	449.72	449.72
69	OC-1521-4	A305983 5/52 SEB	713.74	82.03
70	OC-1524-4	A305981 5/52 SEB	146.46	146.46
71	OC-1525-4	A118470 12/51 SEB	35.60	35.60
72	OC-1531-4	A21277 7/52 JLW	69.96	69.96
73	OC-1534-4	A74453 9/52 JLW	299.88	299.88

[fol. 30]

Item No.	T.I.M.E. Overcharge No.	G A O File Reference	Amount Claimed by United States	T.I.M.E. Agrees It Owes Amount	
74	OC-1574-4	A233784	3/52 SEB	20.75	20.75
75	OC-1575-4	A266039	4/52 SEB	169.73	169.73
76	OC-1623-4	A9868	7/52 JLW	102.64	102.64
77	OC-1624-4	A95946	9/52 JLW	23.20	23.20
78	OC-1537-4	A287271	4/52 SEB	59.83	59.83
79	OC-1566-4	A279920	4/52 SEB	110.09	110.09
80	OC-1567-4	A47907	6/52 JLW	22.37	22.37
81	OC-1565-4	A282424	4/52 SEB	618.10	618.10
82	OC-1564-4	A271740	4/52 SEB	506.48	506.48
83	OC-1522-4	A212010	2/52 SEB	957.22	957.22
				TOTALS	17,657.37
					16,942.03

[fol. 31]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

TRIAL COURT'S OPINION IN LETTER TO ATTORNEYS—
June 30, 1956

Amarillo, Texas
June 30, 1956

Joseph B. Dooley, U. S. District Judge.

Benson & Howard, Lubbock, Texas.

Honorable Heard L. Floore, United States Attorney,
Fort Worth, Texas.

Filed: May 7, 1957.

Re: T. I. M. E. Inc. v. United States of America
No. 1757-Civil
Lubbock Division

Gentlemen:

My conclusions in the above cause are as follows:

The Applicable Rate

The through rate from Marion, Oklahoma, to Plane-haven, California, published in the Rocky Mountain Motor

[fol. 32] Tariff Bureau, Tariff 5A, MF-ICC No. 31, is the proper charge for the shipments in question, not only in conformity with the Interstate Commerce Commission, Tariff MF3, Rule 4 (i), but also upon the authority of the only case coming to my notice, which seems directly in point, that is, T. & M. Transportation Co, v. S. W. Shattuck Chemical Company, 148 Fed. 2d 777. The suggestion of counsel that the aforesaid Tariff MF3, Rule 4 (i), is not applicable to the Government, in view of 31 U. S. C. 71, does not seem sound. There is no such explicit provision in the cited statute. The rule recognized in the decisions is that, in making contracts for the transportation of property by common carriers, the Government stands in the same attitude as any other shipper. Hughes Transportation, Inc. v. United States, 121 F. Supp. 212.

The Plastic Domes

The proper covering classification for this property is that describing "Airplane Parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates", published in Rocky Mountain Motor Tariff Bureau, Tariff No. 5A, MF-ICC No. 31, Item 120, combined with Rule 15, which is a subject covered in the filed stipulations.

Aircraft Ailerons

The proper covering classification for this property is that describing "Wing panels or sections; in boxes or crates", published in National Motor Freight Classification [fol. 33] No. 11, Item 2940, which is a subject covered in the filed stipulations. The Encyclopedia Britannica says that an aileron "is a movable part of the wing of an airplane".

The brief of Government counsel has forecast that, presumably, said counsel will now request that judgment herein be held in abeyance while they file an action with the Interstate Commerce Commission to determine the reasonableness or unreasonableness of the through rate herein mentioned, and, ordinarily, in instances somewhat similar, that course has been approved. General American Tank Car Corp. v. Eldorado Terminal Co., 308 U. S. 422; U. S.

v. Kansas City Southern Ry. Co., 217 Fed. 2d 763. But, in this instance, plaintiff's counsel seems to contend that, in respect to motor carriers, the Interstate Commerce Commission has no authority to decide the reasonableness or unreasonableness of a rate retrospectively as a basis for a reparation ordered by the Commission, or in support of a suit to recover an alleged overcharge by judicial judgment. This seems doubtful to me, just on the face of it, but I have not gone into the question closely, and if Government counsel do move to hold this case at rest, pending action before the Commission, then I would want to know whether such an order would serve any useful purpose, and, consequently, a thorough brief should be presented on the question above mentioned.

Awaiting replies from respective counsel, I am

[fol. 34]

Sincerely yours,

/s/ Jos. B. Dooley, United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

[Title omitted]

DEFENDANT'S MOTION TO HOLD JUDGMENT IN ABEYANCE—
Filed July 18, 1956

Comes now United States of America, defendant and cross plaintiff in the above numbered and entitled cause and respectfully moves the Court to hold in abeyance the [fol. 35] entry of judgment herein for the length of time hereinafter set out, and for the following reasons:

1.

This action was commenced by T.I.M.E., Inc., plaintiff, to recover from the United States of America, defendant, certain transportation charges on shipments originating at

Marion, Oklahoma, and transported by plaintiff through El Paso, Texas, to Planehaven, California. In its answer defendant alleged that the aggregate of intermediate rates to and from El Paso is the applicable rate to said shipments rather than the through rate contained in Rocky Mountain Tariff Bureau as applied by T.I.M.E., Inc. The Court has determined this question adversely to the government.

In addition to its contention as to the applicable rate, defendant alleged that such through rate is *prima facie* unreasonable and therefore unlawful to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso. Since this Court does not have jurisdiction to determine the reasonableness or unreasonableness of the rate to be applied, the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of that question, which is within the exclusive jurisdiction of the Commission.

[fol. 36]

2.

The United States of America has not filed an action before the Commission for such determination because of its contention that the only rate applicable to the forms in question is the aggregate of the intermediates, and no action before the Commission could be commenced until this Court had determined the applicable rate.

3.

No hardship will fall on plaintiff by the Court's delay since even under the Court's adverse decision the government will be entitled to a money judgment.

Wherefore, the United States of America respectfully moves the Court to hold the entry of judgment in this case in abeyance for a period of sixty days from the granting of this motion, to afford her an opportunity to apply to the Interstate Commerce Commission for a determination of the reasonableness or unreasonableness of the rate which the Court deems applicable to the shipments involved herein and if such proceeding is commenced within such sixty day period then to continue to hold the judgment in

abeyance until the Commission has finally determined the reasonableness or unreasonableness of the applicable rate.

[fol. 37] Respectfully submitted,

Heard L. Floore, United States Attorney.

/s/ John A. Lowther, Assistant United States Attorney.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

COURT'S OPINION IN LETTER TO ATTORNEYS—

December 29, 1956

December 29, 1956
Amarillo, Texas

Joseph B. Dooley, U. S. District Judge.

Benson & Howard, Lubbock, Texas.

Honorable Heard L. Floore, United States Attorney,
Fort Worth, Texas.

Filed: Dec. 31, 1956.

[fol. 38] Re: T. I. M. E. v. The United States of America
No. 1757-Civil
Lubbock Division

Gentlemen:

The defendant's motion to hold the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission is overruled and such an order should be presented promptly.

This ruling results from the conclusion that Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246, and McClellan v. Montana-Dakota Utilities Co., 104 F. Supp. 46, affirmed 204 F. 2d 166, certiorari denied 346 U. S. 826, are decisive against said motion.

Ordinarily the Interstate Commerce Commission, like the United States Maritime Commission (Shipping Act, U. S. Code, Title 46, §817 and §821), in connection with reparation authority, may review the reasonableness of rates charged in past shipments. This is true in respect to railroads, (Interstate Commerce Act, U. S. Code, Title 49, §13(1)), and with respect to water carriers, (Interstate Commerce Act, U. S. Code, Title 49, §§907(b) and 908(b)(c)(d)), but that jurisdiction is lacking in respect to motor carriers (Interstate Commerce Act, U. S. Code, Title 49 §316(e)). The Civil Aeronautics Board, as the administrative agency over the air carriers, like the Interstate Commerce Commission, in respect to motor carriers, has [fol. 39] no reparation authority nor jurisdiction to review rates as to past transportation, (Civil Aeronautics Act, U. S. Code, Title 49, §642(d)). The same limitation of authority is found in the Natural Gas Act, U. S. Code, Title 15, §717d(a), and in the Federal Power Act, U. S. Code, Title 16, §824e(a). The legislative policy for these differences may not be evident, but there can be no doubt that the distinction is clearly manifested.

The Montana-Dakota Utilities Co. v. Northwestern Public Service Co. case arose under the Federal Power Act and it will be noticed that the crucial statutory article cited in that decision in the presently material part is virtually word for word the same as the parallel statutory article dealing with motor carriers. In other words, I am unable to see any substantial difference in principle between that case and the present suit. Moreover, the denial of the present motion is also supported in *Slick Airways v. American Airlines*, 107 F. Supp. 199, 212, where the court said "if the instant complaint merely sought to recover damages under the Civil Aeronautics Act on account of unfair competitive practices committed, or unreasonable rates charged, by defendants, I would agree that it would not state a cause of action in this court."

It is true that the action on the present motion is contrary to the decision in *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M. C. C. 337, which was decided before the Montana-Dakota case, and, likewise, contrary to the decision in *New York-New Brunswick Auto Express Co. Inc.*

v. The United States, 126 F. Supp. 215, cited by government counsel; as well as the strongest case for the government, United States v. Garner, 134 F. Supp. 16, but the Montana-Dakota case was not mentioned in either of the two opinions and probably did not come to the notice of the court.

Sincerely yours,

/s/ Jos. B. DOOLEY, United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

[Title omitted]

[fol. 41]

FINAL JUDGMENT—Filed and Entered March 5, 1957

On this day came on to be considered the above styled cause; the Court having tried the case in June of 1956 and having considered the evidence, the stipulation and contentions of the respective parties, and the defendant having filed its motion to hold the entry of judgment in abeyance pending the instituting of proceedings before the Interstate Commerce Commission, and it appearing that such motion should be overruled, the Court finds:

That the through rate from Marion, Oklahoma, to Planehaven, California, published in Rocky Mountain Motor Tariff Bureau, Tariff 5a, M.F.-I.C.C. No. 31, is the only proper charge for the shipments in question, in conformity with the Interstate Commerce Commission Tariff Circular M.F. No. 3, Rule 4(1), and that Rule 4(1) is applicable to the government.

The Court further finds that the proper covering classification for a shipment of "Domes, Airplane, Cellulose, Derivative, Plastic and Metal Combined" is "Airplane parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates", as published in Rocky Mountain Motor Tariff Bureau 5a, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15.

The Court further finds that the proper covering classification on a shipment billed as "8 boxes aircraft ailerons" [fol. 42] is covered in the tariff described as "wing panels or sections; in boxes or crates", as published in National Motor Freight Classification No. 11, Item 2940.

The Court is of the opinion that the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission should be overruled and that jurisdiction is lacking in the Interstate Commerce Commission in respect to Motor Carriers to review the reasonableness of rates charged on past shipments.

It is, therefore, Ordered, Adjudged and Decreed by the Court as follows:

(a) That the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission is overruled.

(b) That the defendant, United States of America, owes plaintiff, T.I.M.E., Inc. the sum of \$14,414.82, and that plaintiff, T.I.M.E., Inc. is indebted to the defendant, United States of America, in the sum of \$16,942.03, and accordingly the defendant, United States of America, on its cross action against T.I.M.E., Inc. is awarded judgment against plaintiff, T.I.M.E., Inc. for the sum of \$2527.21.

[fol. 43] (c) That each party hereto pay the costs incurred by it.

(d) That all other relief herein prayed for is hereby specifically denied.

Entered this the 5th day of March, 1957.

/s/ Jos. B. Dooley, United States District Judge.

Approved as to Form:

/s/ W. D. Benson, Jr., Attorney for Plaintiff.

/s/ A. W. Christian, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 2, 1957

Notice is hereby given that United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth (sic) Circuit from the final judgment entered in this action on the 5th day of March, 1957.

Dated this the 2nd day of May, 1957.

[fol. 44] Heard L. Floore, United States Attorney, /s/ A. W. Christian, Assistant United States Attorney, 206 United States Court House, Fort Worth, Texas, Attorneys for Defendant-Appellant, United States of America.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON APPEAL—

Filed May 29, 1957

The points upon which the appellant United States of America, defendant in the trial court, intends to rely on this appeal are as follows:

1.

The district court erroneously failed to give effect to the consistent holdings of the Interstate Commerce Commission that through rates which exceed the aggregate of intermediate rates are *prima facie* unreasonable, and thus unlawful.

[fol. 45]

2.

In the alternative, the district court erred in denying the defendant's motion to hold the entry of judgment in abeyance to permit the Interstate Commerce Commission to determine the reasonableness of the through rate here involved.

3.

The district court erred in entering judgment on the basis of the applicability of the through rate.

Heard L. Floore, United States Attorney, ~~as~~/A. W. Christian, Assistant United States Attorney, Attorneys for Defendant-Appellant, United States of America.

(Certificate of service omitted in printing.)

[fol. 46] IN UNITED STATES DISTRICT COURT

DESIGNATION OF THE RECORD ON APPEAL—Filed May 29, 1957

United States of America, defendant in the above entitled and numbered cause in the trial court, and appellant on the appeal of such cause to the United States Court of Appeals for the Fifth Circuit, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Plaintiff's First Amended Original Complaint
2. Defendant's Answer, Counterclaim and Cross Action in Reply to Plaintiff's First Amended Original Complaint
3. Stipulations
4. Court's opinion in letter to attorneys dated June 30, 1956
5. Defendant's Motion to Hold Judgment in Abeyance
- [fol. 47] 6. Court's opinion in letter to attorneys dated December 29, 1956
7. Final Judgment
8. Notice of Appeal
9. Statement of Points
10. This Designation.

Heard L. Floore, United States Attorney, /s/ A. W. Christian, Assistant United States Attorney, Attorneys for Defendant-Appellant, United States of America.

(Certificate of service omitted in printing.)

[fol. 48] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
November 18, 1957

(Omitted in printing.)

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16738

UNITED STATES OF AMERICA, Appellant,
versus

T.I.M.E., INCORPORATED, Appellee.

Appeal from the United States District Court for the Northern District of Texas.

OPINION—January 30, 1958

Before Hutcheson, Chief Judge, and Rives and Jones, Circuit Judges.

Rives, Circuit Judge:

T.I.M.E., Incorporated, a motor carrier, sued the United States under the Tucker Act¹ for unpaid transportation

¹28 U.S.C.A. §1346 (a)(2).

charges on shipments of freight. The United States asserted counterclaims upon which the district court held that it was entitled to \$16,942.03, and that holding is not [fol. 51] contested on appeal. This appeal involves solely the question of the correctness of the district court's determination that T.I.M.E. was entitled to a total of \$14,414.82 on its claims.

The facts were stipulated. T.I.M.E. was a common carrier motor carrier operating generally between Oklahoma City, Oklahoma and Los Angeles, California via El Paso, Texas, under authority of the Interstate Commerce Commission. It transported some twenty shipments of scientific instruments under Government bills of lading. A typical shipment illustrates the issues with respect to all of the shipments: it originated at Tinker Air Force Base, Marion, Oklahoma, and was transported over the lines of T.I.M.E. and a connecting carrier to McClellan Air Force Base at Planehaven, California.

At the time, there were on file with the Interstate Commerce Commission the following tariffs to which T.I.M.E. was subject:

(1) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-ICC No. 31, providing a double first-class through rate of \$10.74 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to Planehaven, California.

(2) Southwestern Motor Freight Bureau Tariff No. 1-F, M.F.-ICC No. 141, providing a rate of \$2.56 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to El Paso, Texas.

(3) Interstate Freight Carriers Conference Tariff No. 1-C, N.F.-ICC No. A-5, providing a rate of \$4.35 per cwt. on scientific instruments N.O.I. from El Paso, [fol. 52] Texas to Planehaven, California.

The through rate, \$10.74, was thus considerably in excess of the sum of the intermediate rates, \$6.91. There was,

however, on file with the Commission the official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4(i), which reads:

"(i) When a carrier or carriers establish a local or joint rate for application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route."

The Government had paid the intermediate rates. The district court held that T.I.M.E. was entitled on its claims to a total of \$14,414.82, the difference between the through rate and the aggregate of the intermediate rates.² The Government made some contention at the trial that the combination of the intermediate rates is applicable, but that position is not urged on appeal. The Government's main defense, which it continues to urge in this Court, is that the through rate is *prima facie* unreasonable and unlawful to the extent that it exceeds the aggregate of the intermediate rates, and that the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness or unreasonableness of the rate to be applied.

[fol. 53] Under Tariff M.F.-3, Rule 4(i), quoted *supra*, the fact that the through rate is higher than the aggregate of the intermediate rates does not prevent it from being the applicable rate of the carrier. The Commission has often ruled, however, that through rates are *prima facie* unjust and unreasonable to the extent that they exceed the combination of local rates from and to the same points.³

² Because of the larger amount of the Government's counter-claims, \$16,942.03, not now in issue, judgment was entered in favor of the United States in the amount of \$2,527.21.

³ See Kingan & Co. v. Olson Transportation Co., 32 M.C.C. 10; Stokely Foods, Inc. v. Foster Freight Line, Inc., 62 M.C.C. 179; United States v. Davidson Transfer & Storage Co., Inc., No. MC-C-1849, decided October 14, 1957.

Section 216(c) of the Interstate Commerce Act, 49 U.S.C.A. 316(c), provides that: "Common carriers of property by motor vehicles may establish reasonable through routes and joint rates, charges, and classifications" with other carriers. Section 216(d), 49 U.S.C.A. 316(d), provides that: all charges of motor carriers for services covered by the Act "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." Section 204(c), 49 U.S.C.A. 304(c), provides that: upon complaint or upon its own initiative the Commission may investigate whether any motor carrier has failed to comply with any provision of the chapter or with any requirement established pursuant thereto, and issue an appropriate order to compel compliance.

Sections 13, et seq. of the Act, 49 U.S.C.A. 13, et seq., dealing with railroads, gives the Commission authority to award reparations, subject to a two-year limitation period, Section 16(3), 49 U.S.C.A. 16(3); but part II of [fol. 54] the Act covering motor carriers contains no similar provision. Nevertheless, the Commission has consistently held that the general powers conferred upon it in the Sections already mentioned and in other sections furnish authority to determine the reasonableness of a past rate, the lawfulness of which is brought into issue in a judicial proceeding.

Holdings to that effect had been made in a long line of decisions by divisions of the Commission.* In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, the full Commission undertook a "thorough re-examination" of its authority to "make an administrative determination of the lawfulness of rates charged on past shipments," and concluded that the earlier decisions of its

* See *W. A. Barrows Porcelain Enamel Co. v. Cushman M. Delivery*, 11 M.C.C. 365, 367; *Hausman Steel Co. v. Seaboard Freight Lines, Inc.*, 32 M.C.C. 31; *Dixie Mercerizing Co. v. ET and WNC Motor Transp. Co.*, 21 M.C.C. 491, affirmed on reconsideration, 41 M.C.C. 355; *Koppers Co. v. Langer Transport Corp.*, 12 M.C.C. 741; *Hill-Clarke Machinery Co. v. Webber Cartage Lines, Inc.*, 26 M.C.C. 144; *Patten Blinn Lbr. Co. v. Southern Arizona Freight Lines*, 31 M.C.C. 716.

divisions were correct. The opinion in the *Bell Potato Chip Co.* case, *supra*, was reconsidered at length and approved by the Commission in the very recent case of *United States v. Davidson Transfer & Storage Co., Inc.*, No. M-C-1849, decided October 14, 1957.

This construction of the Act by the body charged with primary responsibility for its administration is, of course, entitled to great weight by the courts.⁵ Following such [fol. 55] construction, the Court of Claims and another district court have looked to the Commission for aid in the disposition of suits involving past motor carrier rates alleged to be unreasonable.⁶

The district court in the present case thought that the case of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, precluded it from holding the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission. That was a five-to-four decision in which the majority held that the complaint stated no federally cognizable cause of action to which the referred issue was subsidiary. After full discussion, that case was distinguished in the report of the Commission in *United States v. Davidson Transfer & Storage Co., Inc.*, *supra*, with the conclusion that:

“ * * * * However, we do not interpret the *Montana-Dakota* case as holding that where a cause of action to which the issue of reasonableness is subsidiary is maintainable in the court in which it is brought, reasonableness issue may not be determined by the proper administrative body.”

⁵ See *United States v. Bergh*, 1956, 352 U.S. 40, 47; *Adams v. United States*, 1943, 319 U.S. 312, 314-315; *United States v. Citizens Loan & Trust Co.*, 1942, 316 U.S. 209, 214; *Inland Waterways Corp. v. Young*, 1940, 309 U.S. 517; *United States v. American Trucking Associations, Inc.*, 1940, 310 U.S. 534, 549; *United States v. Madigan*, 1937, 300 U.S. 500, 506; *Norwegian Nitrogen Co. v. United States*, 1933, 288 U.S. 294, 315; *United States v. Jackson*, 1930, 280 U.S. 183, 193; *Edwards's Lessee v. Darby*, 1827, 12 Wheat. (25 U.S.) 207, 210.

⁶ *New York & New Brunswick Auto Express Co. v. United States*, Ct. of Cl. 1954, 126 F.Supp. 215; *United States v. Garner*, E.D.N.C. 1955, 134 F.Supp. 16.

In *United States v. Western Pacific R. Co.*, 1956, 352 U.S. 59, 72, it was argued that, because Section 16(3) of [fol. 56] the Act prevented the Commission from considering complaints for overcharges against railroad carriers not filed within two years from the time the cause of action accrued, that the Commission was barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions came to the Commission by way of referral or an original suit. The Supreme Court held:

"* * * that the limitation of § 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff."

United States v. Western Pacific R. Co., *supra* at p. 74

The case of *United States v. Chesapeake & Ohio R. Co.*, 1956, 352 U.S. 77, 81, decided on the same day, is to the same effect. From those decisions, it would seem to follow that the Commission's lack of power to award reparations does not negative its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable cause of action pending in court.

Congress undertook, in terms, to save existing common law and statutory rights and remedies. Section 216 of the Act, 49 U.S.C.A. 316, relating to the duty to establish reasonable rates, concludes with a provision that: "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith." Very clearly, [fol. 57] the district court could not itself undertake an independent investigation into the reasonableness of the rate. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. The court, then, had the alternative either of denying the shipper any remedy against a filed rate, which on its face was *prima facie* unreasonable and unlawful, or of holding its judgment in abeyance to permit a determination of the reasonableness of the rate by the Interstate Commerce Commission. In our opinion, the second alternative is more consistent with justice, with

the terms of the Interstate Commerce Act, and with the cases. The judgment of the district court is, therefore, reversed and the cause remanded with directions to grant the motion to hold the judgment in abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved.

Reversed and remanded with directions.

[fol. 58]

IN UNITED STATES COURT OF APPEALS

No. 16738

UNITED STATES OF AMERICA,

versus

T.I.M.E. INCORPORATED.

JUDGMENT—January 30, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to grant the motion to hold the judgment in abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved.

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUITAPPELLEE'S PETITION FOR REHEARING—
Filed February 19, 1958

Comes now T.I.M.E. Incorporated, the Appellee, and files this, its Petition for Rehearing, and would show the court:

I.

This court erred in holding that the District Court should have held its judgment in abeyance in order that the Government may obtain determination of the reasonableness of an applicable rate from the Interstate Commerce Commission.

[fol. 60]

II.

This court erred in holding that the Interstate Commerce Commission, in spite of its admitted lack of reparations authority over motor carriers, has the power to decide the reasonableness of an applicable rate charged by such carriers on shipments handled in the past.

III.

This court erred in declining to follow *Montana-Dakota Utilities Company v. Northwestern Public Service Company*, 341 U.S. 246, (1951).

IV.

This court erred in applying the law announced in *United States v. Western Pacific Railroad Company*, 352 U.S. 329, (1956), because the facts in the present case do not give rise to the application of such law.

Wherefore, the Appellee prays that the court grant this Petition for Rehearing and set aside its judgment of January 30, 1958, and enter judgment affirming the decision of the trial court.

Respectfully submitted,

Benson & Howard, 1105 Great Plains Life Bldg.,
Lubbock, Texas, By /s/ W. D. Benson, Jr.,
Attorneys for Appellee.

[fol. 61] (Certificate of service omitted in printing.)

[fol. 62]

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—February 25, 1958

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 63] Clerk's Certificate to foregoing transcript (omitted in printing.)

[fol. 64]

SUPREME COURT OF THE UNITED STATES

No. 68, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 96 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY,
INC., PETITIONER,

U.S.

UNITED STATES OF AMERICA.

WITI OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1958
CERTIORARI GRANTED OCTOBER 18, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY,
INC., PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 31, 1958



[fol. 1]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14123

UNITED STATES OF AMERICA, Appellant,

v.

DAVIDSON TRANSFER & STORAGE COMPANY, INC., Appellee.

Appeal From the United States District Court for the
District of Columbia

Joint Appendix—Filed October 16, 1957

[File endorsement omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

RELEVANT DOCKET ENTRIES

1955

Feb. 15 Complaint filed.

July 1 Answer of deft. to complt. filed.

1957

May 27 Motion of plft. for summary judgment filed.

June 6 Cross-motion of deft. for summary judgment filed.

June 10 Order granting plaintiff's motion for summary judgment and denying deft's. cross-motion for summary judgment and that plft. recover from deft. the sum of \$18.34 with interest and costs (N). McGarraghy, J.

Aug. 7 Notice of appeal by deft. filed.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 673-55

DAVIDSON TRANSFER & STORAGE CO., INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant.

COMPLAINT FOR BREACH OF CONTRACTS—

Filed February 15, 1955

1. The jurisdiction of this Court is founded on Section 1346 (a) (2) of Title 28 of the United States Code, giving the United States District Courts original jurisdiction of civil actions against the United States, not exceeding \$10,000 in amount, founded upon any express or implied contract with the United States. The amount for which judgment is sought does not exceed \$10,000.
2. Plaintiff, a Maryland Corporation, maintaining a place of business and doing business in the District of Columbia, is a common carrier by motor certificated by the Interstate Commerce Commission to operate, and operating, as a common carrier of freight in interstate commerce.
3. Plaintiff brings this suit, pursuant to Rule 23 (a) (3) of the Rules of Civil Procedure for the United States Courts, on behalf of itself and all of the other common carriers, some known and some unknown to Plaintiff, who are similarly situated and who subsequently become parties plaintiff to this suit. The common carriers similarly situated are so numerous and their individual causes of action are for such small amounts that it is impracticable to bring them all before the Court.
4. On or about May 29, 1952 Defendant, by a duly authorized agent, tendered to Plaintiff at Poughkeepsie, New York, for carriage to Bellbluff, Virginia, four shipments of

waterproofed cloth, covered by United States Government [fol. 4] Bills of Lading Nos. WV-9460830, WV-9460831, WV-9460832 and WV-9460833. Said shipments were transported by Plaintiff to Bellbluff, Virginia, where delivery was made to Defendant.

5. Defendant paid Plaintiff freight charges on the four shipments hereinabove described as follows: \$304.38 on the shipment covered by United States Government Bill of Lading No. WV-9460830; \$304.46 on the shipment covered by United States Government Bill of Lading No. WV-9460831; \$304.18 on the shipment covered by United States Government Bill of Lading No. WV-9460832; and \$279.82 on the shipment covered by United States Government Bill of Lading No. WV-9460833. Said charges were computed on the basis of the rates duly filed with and accepted by the Interstate Commerce Commission as the only legal, applicable rates for said transportation.

6. On or about September 30, 1954 Defendant, by its agent the General Accounting Office of the United States, demanded that Plaintiff refund to Defendant \$4.78, \$4.86, \$4.58 and \$4.12, respectively, on the four shipments described in Paragraph 5 of this Complaint. The ground of said demand was that the Interstate Commerce Commission had ordered, on July 20, 1953, in *Investigation and Suspension Docket No. M-3929, Surcharges, New York State*, reported in 62 Motor Carrier Cases 117, that Plaintiff Davidson and other common carriers cancel that portion of the legal, applicable rates for the transportation described in Paragraph 6 of this Complaint which had been legally made effective on May 8, 1952 and which were a surcharge on shipments moving in interstate commerce from, to, between or through points in the State of New York. In said demand Defendant stated that, unless the amounts demanded were paid within sixty days, deductions might be made from amounts otherwise due Plaintiff from Defendant pursuant to Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. A. 66.

7. On or about November 24, 1954 Plaintiff, to avoid having Defendant deduct the amount of its demand, as it

had threatened to do, and as Plaintiff and Defendant well knew it would do, from amounts otherwise due Plaintiff from Defendant, paid said demand under protest.

[fol. 5] 8. Defendant breached its contracts with Plaintiff for the transportation hereinabove described in that it exacted from Plaintiff the sums demanded by Defendant. Said sums are a portion of the total freight charges payable under the contracts for the transportation hereinabove described, computed on the basis of rates for said transportation filed with and approved by the Interstate Commerce Commission as the only legal rates applicable to said transportation.

9. The Interstate Commerce Commission is exclusively charged by law with the function of fixing just, reasonable and otherwise lawful rates for common carriers by motor.

49 U. S. C. A. 316. Common carriers by motor are required by law to file all of their rates for transportation in interstate commerce with the Interstate Commerce Commission, and are forbidden "to charge or demand or collect or receive a greater or less or different compensation for transportation * * * than the rates specified in the tariffs in effect at the time * * *." 49 U. S. C. A. 317 (b). The General Accounting Office of the United States has no authority to refuse to pay or to coerce refund of freight charges computed on the basis of any other rates than those filed with and approved by the Interstate Commerce Commission. Section 322 of the Transportation Act of 1940, 49 U. S. C. A. 66, giving it the right to deduct overpayments to common carriers from amounts subsequently found to be due such carriers, gives it only the right to deduct overpayments made on the basis of erroneously computed freight charges. It gives it no right to deduct payments of properly computed freight charges, based on applicable legal rates, whether or not the General Accounting Office deems those rates just and reasonable.

10. The Interstate Commerce Commission, in its opinion and order described above, upon the basis of which Defendant exacted refund from Plaintiff did no more than (1) find that the form of the tariffs under consideration, i.e.,

a surcharge, was an inappropriate one for the recoupment by common carriers of the cost of a truck mileage tax imposed by the State of New York, and (2) order its discontinuance. The Commission did not find that the collection of freight charges based on the surcharge for transportation rendered during the period the surcharge was in [fol. 6] effect was illegal. In other words, the Commission's opinion and order spoke prospectively only and not retroactively.

Wherefore, Plaintiff prays judgment against Defendant for freight charges in the amounts of \$4.78, \$4.86, \$4.58, and \$4.12, respectively, on the four shipments described in Paragraph 5 of this Complaint, a total of \$18.34, with interest and costs, and for such other and further relief as the Court deems meet in the premises.

/s/ Bryce Rea, Jr., 1329 E Street, N. W., Washington 4, D. C., Counsel for Davidson Transfer & Storage Co., Inc.

Of counsel:

Edgar Watkins, 1329 E. Street, N. W., Washington 4, D. C.

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

ANSWER—Filed July 1, 1955

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Answering the numbered paragraphs of the complaint, defendant avers:

1. Defendant is not required to answer the allegations contained in paragraph 1 of the complaint.
2. Admitted.

3. Defendant is without information with which to form a belief as to the truth or falsity of the allegations of paragraph 3 of the complaint.

4. Admitted.

5. Defendant admits that it paid plaintiff freight charges on the four shipments described in paragraph 4 in the amounts listed in paragraph 5. Defendant denies all other allegations in paragraph 5 of the complaint.

[fol. 7] 6. Admitted.

7. Admitted.

8. Denied.

9. Defendant admits the Interstate Commerce Commission is exclusively charged by law with the function of fixing just, reasonable, and otherwise lawful rates for common carriers by motor and that common carriers by motor are required by law to file all of their rates for transportation in interstate commerce with the Interstate Commerce Commission and are forbidden to charge or demand or collect or receive a greater or less or different compensation for transportation than the rates specified in the tariff in effect at the time. The remaining allegations in paragraph 9 are conclusions of law to which an answer is not required, but insofar as they may be deemed facts well pleaded, they are denied.

10. The allegations contained in paragraph 10 are conclusions of law to which an answer is not required but insofar as they may be deemed facts well pleaded, they are denied.

Wherefore, having fully answered defendant demands judgment herein in its favor, together with the costs of this action.

/s/ Leo A. Rover, United States Attorney;

/s/ Oliver Gasch, Assistant United States Attorney;

/s/ Frank H. Strickler, Assistant United States Attorney;

/s/ William F. Becker, Assistant United States Attorney.

7

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed May 27, 1957.**

Comes now Plaintiff and, pursuant to Rule 56 (a) of the Rules of Civil Procedure and leave granted in the pre-trial [fol. 8] order of the Honorable Burnita Matthews, moves the Court for Summary Judgment on the grounds that the Complaint and Answer thereto and the stipulation agreed to by counsel at the pre-trial conference show that there is no genuine issue of any material fact and that Plaintiff is entitled to judgment as a matter of law. A memorandum of points and authorities in support of this motion is attached hereto.

/s/ Bryce Rea, Jr., /s/ Donald E. Cross, 1329 E
Street, N. W., Washington 4, D. C.

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

**DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT—
Filed June 6, 1957.**

Comes now the defendant by its attorney, the United States Attorney, and respectfully moves this Court for summary judgment on the ground that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law.

/s/ Oliver Gasch, United States Attorney;
/s/ Edward P. Troxell, Principal, Assistant United
States Attorney;
/s/ E. Riley Casey, Assistant United States At-
torney;
/s/ William R. Rafferty, Assistant United States
Attorney.

[fol. 9]

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, ETC.—
Filed June 10, 1957

This cause having come on and been heard on the Motion of Plaintiff for Summary Judgment and the Cross-Motion of Defendant for Summary Judgment and the Court having considered the pleadings, the pre-trial statement, the memoranda of points and authorities in support of said Motions, and the oral argument of counsel, and having concluded therefrom that there is no genuine issue as to any material fact, and that Plaintiff is entitled to judgment as a matter of law, it is this 10th day of June, 1957

Ordered That the Plaintiff's Motion for Summary Judgment be, and the same hereby is, granted, and that Defendant's Cross-Motion for Summary Judgment be, and the same hereby is, denied, and that the Plaintiff have and recover from Defendant the sum of \$18.34, with interest at four (4) percent as provided in Section 2411 (b) of Title 28 of the United States Code and its costs of suit.

/s/ Joseph C. McGarragh, Judge.

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NOTICE OF APPEAL—Filed August 7, 1957

Notice is hereby given this 7th day of August, 1957 that The United States of America, the defendant, above named hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment and order of this Court entered on the 10th day of June, 1957 in favor of Davidson Transfer and Storage Company, Inc., the plaintiff above named against said defendant, the United States of America.

/s/ Oliver Gasch, United States Attorney, Attorney
for Defendant.

[fol. 10] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 14123

v.

UNITED STATES OF AMERICA, Appellant,

DAVIDSON TRANSFER & STORAGE COMPANY, INC., Appellee.

Appeal From the United States District Court for the
District of Columbia

Mr. Alan S. Rosenthal, Attorney, Department of Justice, with whom Assistant Attorney General Doub, Mr. Oliver Gasch, United States Attorney, Mr. Paul A. Sweeney, Attorney, Department of Justice, and Mr. Melvin Richter, Attorney, Department of Justice, at the time the brief was filed, were on the brief, for appellant. Mr. Lewis Carroll, Assistant United States Attorney, also entered an appearance for appellant.

Mr. Bryce Rea, Jr., for appellee. Mr. Donald E. Cross also entered an appearance for appellee.

Before Prettyman, Bazelon and Bastian, Circuit Judges.

OPINION—Decided April 24, 1958

Prettyman, Circuit Judge: This is a civil action brought in the District Court against the United States under the [fol. 11] Tucker Act¹ on a contract. The plaintiff was Davidson Transfer & Storage Company, Inc., appellee here, a motor carrier. The contract was for the carriage of goods from Poughkeepsie, New York, to Bellbluff, Virginia. The

¹ 28 U.S.C. § 1346(a)(2).

District Court, on cross motions for summary judgment, rendered judgment for Davidson.

The State of New York had levied a ton-mile truck tax for the privilege of operating motor vehicles on its highways. Davidson filed with the Interstate Commerce Commission, as a tariff, a surcharge which purported to cover this tax. On the bills of lading here involved the Government paid the full tariff rate, including the surcharge. Later, upon a threat of offset pursuant to audit by the General Accounting Office, Davidson repaid to the Government the amount of the surcharge. Davidson then filed its suit to recover.

Davidson filed its tariff with the Interstate Commerce Commission on October 8, 1951. The Commission suspended the effective date for seven months, the maximum period allowed by the statute.² By the end of that period the Commission had not completed its inquiry, and the filed tariff went into effect on May 8, 1952. Thereafter, on July 20, 1953, the Commission issued its findings and order, concluding that the New York tax should be treated as a normal operating expense, to be reflected in the carriers' rates rather than in surcharges, and further concluded that the surcharges were unjust and unreasonable. The Commission ordered the surcharges cancelled, and they were cancelled on October 15, 1953. The transportation for which the amounts here in dispute were paid occurred during the period when the surcharges were in effect, that is, between May 8, 1952, and October 15, 1953.

[fol. 12] The contentions of the parties, summarized, are:

United States.

While the Interstate Commerce Commission cannot award reparations in motor-carrier cases, it has the power and duty to determine the reasonableness of a past motor-carrier rate which is at issue in a judicial proceeding. The Commission has consistently so held in a line of cases culminating in *Bell Potato Chip Co.*

² See: 216(g), Interstate Commerce Act, 49 STAT. 559 (1935), 52 STAT. 1240 (1938), 54 STAT. 924 (1940), 49 U.S.C.A. § 316(g).

v. *Aberdeen Truck Line*,³ recently reaffirmed in another case involving our present appellee.⁴ The reasoning in those cases is that the Commission has broad power to enforce compliance with the statute; that Congress has forbidden unjust and unreasonable rates; that to allow recovery of an unlawful charge would be inconsistent with the statutory preservation of shippers' common-law remedies; and that, unless the Commission's assistance were sought on the issue of the reasonableness of a rate in a judicial proceeding, the purpose of the primary jurisdiction rule would be totally frustrated. Other courts, notably the Court of Claims,⁵ have looked to the Commission for aid in the disposition of suits involving the reasonableness *vel non* of past motor-carrier rates. The Supreme Court, in two recent cases,⁶ has dispelled all doubt as to the Commission's jurisdiction to find a past motor-carrier rate unreasonable, and its lack of jurisdiction to award reparations does not affect the necessity of deferring to the Commission's view on questions raised in a judicial proceeding by way of defense and within the [fol. 13]-Commission's primary jurisdiction. *Montana-Dakota*⁷ is not to the contrary.

Davidson.

As long as the surcharge was in effect the United States was bound to pay it and the carrier was bound to collect it. The failure of the Commission to make its suspension order effective immediately shows the

³ 43 M.C.C. 337 (1944).

⁴ United States v. Davidson Transfer & Storage Co., No. MCC-1849 (Oct. 14, 1957).

⁵ New York & New Brunswick Auto Exp. Co. v. United States, 126 F.Supp. 215 (1954).

⁶ United States v. Western Pac. R.R., 352 U.S. 59, 1 L.Ed. 2d 126, 77 S.Ct. 161 (1956); United States v. Chesapeake & Ohio Ry., 352 U.S. 77, 1 L.Ed. 2d 140, 77 S.Ct. 172 (1956).

⁷ Montana-Dakota Co. v. Pub. Serv. Co., 341 U.S. 246, 95 L.Ed. 912, 71 S.Ct. 692 (1951).

findings were directed solely to the future. The findings show the Commission was not concerned with unreasonableness but with correcting for the future an undesirable rate structure. When the Commission intends to make findings as a (sic) to past unreasonableness, it does so on specific terms. If reparations could not be had directly by suit, they cannot be had indirectly by withholding payment. The power of the General Accounting Office to offset payments to carriers does not give the United States greater rights than private shippers have. Nor does the fact that the carrier and not the shipper brought this suit make any difference. The question is whether the United States has a justiciable legal right to any rate other than the filed rate. It is immaterial whether the United States is plaintiff or defendant. The case is therefore distinguished from *Western Pacific*.⁸ The District Court soundly reasoned that to permit the United States to refuse to pay the filed and effective surcharge would be to convert the power of the Commission to suspend for seven months into the power to suspend completely. If Congress had so intended it would have said so. It so provided in respect to rail carriers in Part I of the Interstate Commerce Act; its failure so to provide in respect to motor carriers was clearly deliberate. The rate-making power of the Commission over motor carriers is prospective only. One result of this restriction is that a shipper may be deprived of his right to reasonable rates for [fol. 14] a limited time while rates are under investigation. Another result is that a carrier may suffer a similar deprivation. Both results are examples of "regulatory lag", an inevitable consequence of the statutory scheme. Rate reasonableness is not a justiciable legal right but rather a criterion for administrative application. The only legal rate is the filed rate. The Supreme Court so held in *Montana-Dakota, supra*. The reason the buyer's complaint in that case failed to state a federally cognizable cause of action was that

⁸ United States v. Western Pac. R.R., 352 U.S. 59, 1 L.Ed. 2d 126, 77 S.Ct. 161 (1956).

charging an unreasonable filed and effective rate did not constitute a violation of a justiciable legal right. It makes no difference whether the right is alleged by complaint for reparations or as defense to a suit for charges. In *Western Pacific, supra*, the Court merely held that the Court of Claims must refer the question of reasonableness to the Commission because of the facts in the case and the ambiguity of the tariff. The Interstate Commerce Act gives shippers a legal right to reparations in rail charges but does not do so in motor-carrier charges. In the motor-carrier cases upon which the United States relies, this issue was not raised. Whatever common-law right a shipper may have had to recover for unreasonable rates was superseded by Part II of the Interstate Commerce Act. Such a common-law right would be inconsistent with the statute.

The basic issue is whether, after the passage of the Interstate Commerce Act, a shipper by motor carrier has a right to a reasonable rate, cognizable in court as a defense to a claim for the amount of a filed and effective rate. We think the United States must prevail on this issue.

At common law a shipper had a right to a reasonable rate. The Interstate Commerce Act preserved that concept in respect to both railroads and motor carriers, declaring it to be the duty of every common carrier to establish just and reasonable rates⁹ and declaring every unjust and un[fol. 15] reasonable rate to be unlawful.¹⁰ The statutory scheme of procedure and power in respect to rail carriers is in Part I of the Act,¹¹ principally in Sections 15 and 16;¹² and in respect to motor carriers it is in Part II,¹³ principally

⁹ 41 STAT. 475 (1920), 49 U.S.C.A. § 1(5); 49 STAT. 558 (1935), 49 U.S.C.A. § 316(a) and (b).

¹⁰ 41 STAT. 475 (1920), 49 U.S.C.A. § 1(5); 49 STAT. 558 (1935), as amended 54 STAT. 924 (1940), 49 U.S.C.A. § 316(d).

¹¹ 24 STAT. 379 (1887), as amended, 49 U.S.C.A. § 1 *et seq.*

¹² *Id.*, 49 U.S.C.A. §§ 15, 16.

¹³ 49 STAT. 543 (1935), as amended, 49 U.S.C.A. § 301 *et seq.*

Section 216.¹⁴ Both Part I and Part II provide that when a complainant alleges that a rate being charged is unreasonable the Commission shall determine the lawful rate to be thereafter observed. Part I, relating to rail carriers, proceeds further and provides that the Commission may award damages in such a case and direct the carrier to pay them.¹⁵ Such an order is enforceable in a civil action by a federal district court. But Part II of the Act, relating to motor carriers, contains no provisions similar to these latter provisions of Part I. No authority is conferred on the Commission to award damages in respect to motor-carrier rates.

A similar situation exists in respect to proposed new rates. In both rail and motor-carrier cases the Commission may suspend a proposed new tariff for a limited time and determine the reasonable rate. If the tariff has gone into effect due to the expiration of the suspension, the Commission may, in the case of a rail carrier, order a refund to the shipper of the charged and collected excess over the reasonable rate.¹⁶ But no provision as to refunds [fol. 16] appears in Part II of the Act, relating to motor carriers.

A fixed rate determined by the Commission to be reasonable is not only the legal rate but also the lawful rate. This was thoroughly explained in the *Arizona Grocery* case.¹⁷ While that case dealt with rail carriers its doctrines seem clearly applicable to motor carriers. The Court held that the Commission cannot disavow its legislative rate-making action and award reparations upon a different finding of reasonableness. If, on the other hand, the rate is carrier-made, not determined by the Commission to be reasonable, a shipper may complain and the statutory provisions we have described take effect.

The surcharge now before us, imposed by a motor carrier, had been filed and was effective but was not a Commission-

¹⁴ *Id.*, 49 U.S.C.A. § 316.

¹⁵ 34 STAT. 590 (1906), as amended, 49 U.S.C.A. § 16(1).

¹⁶ 36 STAT. 552 (1910), as amended, 49 U.S.C.A. § 15(7).

¹⁷ *Arizona Grocery v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 76 L.Ed. 348, 52 S.Ct. 183 (1932).

approved rate. We think a shipper by motor carrier was not deprived of his right to a reasonable rate because of the failure of Congress to give the Commission the adjudicatory function, a quasi-judicial power, of awarding reparations. He was merely left to his old remedy, i.e., a civil action in court.

Absent a statute creating a special forum, a shipper's common-law rights were enforceable in court upon a complaint seeking reparations for unreasonable charges collected by a carrier.¹⁸ The motor-carrier Part of the Inter-[fol. 17] state Commerce Act specifically provides that all remedies not inconsistent with its provisions regarding rates survive its passage.¹⁹ Failure to provide in a new statute a new remedy is not inconsistent with the retention of an existing common-law remedy. Since the Act did not extinguish the right to reasonable rates for past services but merely failed to provide an administrative forum for adjudication of the damages, the right itself survived and the old remedy survived.

The remainder of the answer to the pending controversy falls rapidly into place. Davidson had a right to sue for its filed charges; the United States, a shipper, had a right to defend upon the ground that the claimed rate was unreasonable. At that point the doctrine of primary jurisdi-

¹⁸ Arizona Grocery v. Atchison, Topeka & Santa Fe Ry., *supra*; Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 436, 51 L.Ed. 553, 27 S.Ct. 350 (1907); Lewis-Simas-Jones Co. v. Southern Pac. Co., 283 U.S. 654, 660, 75 L.Ed. 1333, 51 S.Ct. 592 (1931); Interstate Commerce Comm'n v. Cincinnati, New Orleans & T. P. Ry., 167 U.S. 479, 505-506, 42 L.Ed. 243, 17 S.Ct. 896 (1897); Interstate Commerce Comm'n v. Baltimore & Ohio R.R., 145 U.S. 263, 36 L.Ed. 699, 12 S.Ct. 844 (1892); Dow v. Beidelman, 125 U.S. 680, 687, 31 L.Ed. 841, 8 S.Ct. 1028 (1868); Western Union Tel. Co. v. Call Pub. Co., 181 U.S. 92, 102, 45 L.Ed. 765, 21 S.Ct. 561 (1901); Mitchell Coal Co. v. Pennsylvania R.R., 230 U.S. 247, 264, 57 L.Ed. 1472, 33 S.Ct. 916 (1912); Tift v. Southern Ry., 138 Fed. 753, 759 (C.C.W.D.Ga. 1905), *aff'd*, 206 U.S. 428, 51 L.Ed. 1124, 27 S.Ct. 709 (1907); Smith v. Chicago & N.W. Ry., 49 Wis. 443, 5 N.W. 240 (1880); West Virginia Transportation Co. v. Sweetzer, 25 W.Va. 434, 444 *et seq.* (1885); BEALE & WYMAN, RAILROAD RATE REGULATION 12-15 (1906); II SHARFMAN, INTERSTATE COMMERCE COMMISSION 393-406 (1931).

¹⁹ 49 STAT. 560 (1935), 49 U.S.C.A. § 316(j).

tion comes into play, and the *Western Pacific* case, *supra*, requires that the court refer the issue of reasonableness to the Commission. We need not here analyze that case.

We think the Commission's findings in respect to the proposed tariff were not sufficiently clear to serve as the basis for judicial judgment upon the complaint. It is not clear whether the Commission meant to find the surcharge an unreasonable rate during the then-past period when it was in effect.

We find ourselves in accord with the opinion of the Fifth Circuit in *United States v. T.I.M.E. Incorporated*.²⁰ [fol. 18] *Montana-Dakota*, *supra*, is not to the contrary. That was a lawsuit between two private utility companies, one claiming that the other had charged it unreasonable rates for electric energy. The plaintiff sued for the excess above a reasonable rate. The problem was whether it stated a federally cognizable cause of action. There was no diversity of citizenship, so a federal court could not entertain the suit absent some special federal statute. The plaintiff presented an ingenious theory. It said that a fraud, due to an interlocking directorate of supplier and supplier, prevented it from appealing to the Federal Power Commission to fix a reasonable rate, and that therefore its suit was one to enforce the Power Act, which Act entitled it to reasonable rates. But the Supreme Court pointed out that alleged fraud adds nothing to federal jurisdiction. The plaintiff urged that the Commission had no power to grant reparations; but again it was clear that this lack created no federally cognizable cause of action. The difficulty was not lack of a cause of action but lack of a cause cognizable in a federal court.

Sentences from the opinion are urged upon us by Davidson to support its position, but we think the Court was discussing the case before it and not broad general principles inapplicable to its pending problem. That it was thus minded is apparent enough if its discussion is read carefully and in full context. In the case before us on this appeal there is a federally cognizable cause of action, an alleged breach of contract by the United States, and so this controversy falls outside the *Montana-Dakota* ruling.

²⁰ 252 F.2d 178 (1958).

The cause will be remanded to the District Court with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective. Upon receipt of that finding the District Court [fol. 19] will proceed to the adjudication of the action before it.

Reversed and remanded.

Bazelon, Circuit Judge, heard oral argument but did not participate in consideration or decision of this case.

[fol. 20] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 14,123—April Term, 1958.

C. A. 673-55

UNITED STATES OF AMERICA, Appellant,

v.

DAVIDSON TRANSFER & STORAGE COMPANY, INC., Appellee.

Appeal From the United States District Court for the
District of Columbia

Before: Prettyman, Bazelon and Bastian, Circuit Judges.

JUDGMENT—April 24, 1958

This Cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the said District Court

appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective.

Dated: April 24, 1958.

Per Circuit Judge Prettyman.

Circuit Judge Bazelon heard oral argument but did not participate in consideration or decision of this case.

[fol. 23] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 24]

SUPREME COURT OF THE UNITED STATES

No. 96, October Term, 1958

DAVIDSON TRANSFER & STORAGE COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 68 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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MAY 26 1956
JOHN T. FEY, Clerk

No.

1027 68

In the

Supreme Court of The United States

OCTOBER TERM, 1956

T.I.M.E. INCORPORATED,

Petitioner and Appellee Below,

vs.

UNITED STATES OF AMERICA

Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No.

In the

Supreme Court of The United States

OCTOBER TERM, 1954

T.I.M.E. INCORPORATED,

Petitioner and Appellee Below,

vs.

UNITED STATES OF AMERICA

Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF
JUSTICE OF THE UNITED STATES, AND THE AS-
SOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

Your petitioner, T.I.M.E. Incorporated, respectfully
shows:

1.

OPINIONS OF THE COURT BELOW

The opinion of the United States District Court for the
Northern District of Texas is unreported, but is found in
the Record at Pages 31-38 and appended hereto (Ap-

pendix P. 17). The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 252 Federal Reporter, Second Series, Page 178, and is found in the Record at Page 50 and is appended hereto. (Appendix P. 28).

2.

JURISDICTION

The date of the judgment of the court below is January 30th, 1958, motion for rehearing overruled February 25, 1958 (R. 62).

This Court has jurisdiction under Title 28, Section 1254, (1) of the United States Code and is provided for under the rules of this Court in Rule 19, 1(b).

3.

QUESTIONS FOR REVIEW

The basic question for review may be stated thus:

(1) In a suit on past shipments instituted by a Motor Carrier operating in interstate commerce under the authority of the Interstate Commerce Commission against a shipper (United States of America) upon the *applicable* rate provided for in its tariffs, may the sole defense by the shipper that the applicable rate is unreasonable, require referral of the question of the reasonableness of the applicable rate to the Interstate Commerce Commission.

Restated:

In the absence of reparation authority in the Interstate Commerce Commission in Motor Carrier cases, may the defense, in a suit upon an applicable rate, that the applicable rate is unreasonable and being the sole issue

involved, be referred to the Interstate Commerce Commission for the determination of unreasonableness alone.

(2) The procedure for determining a reasonable rate, if referral is permissible, on past Motor Carrier shipments.

4.

STATUTES APPLICABLE

The relevant portion of Section 217 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 560, 49 U.S.C.A. Sec. 317(a), (b) and (c) provides:

"(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, ***"

"(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares and charges specified in the tariffs in effect at the time, and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except

such as are specified in its tariffs: Provided, that the provisions of Section 1 (7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

"(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The commission may, in its discretion and for good cause shown, allow such a change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions."

The relevant portion of Section 222 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 564, 49 U.S.C.A. Sec. 322 (b) and (c), provides:

"(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for

any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition: ***

"(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who . . . shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge; . . . shall be deemed guilty of a misdeameanor and upon conviction thereof be fined not more than \$500 for the first offense and not more than \$2,000 for any subsequent offense."

The relevant portion of Section 216 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 558, 49 U.S.C.A. Sec. 316(e), (g) and (j) provides:

"(e) Any person, state board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing . . . the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classifica-

tion, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge *thereafter* to be observed, or the lawful classification, rule, regulation, or practice *thereafter* to be made effective * * *

"(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement, in writing, of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such

rate, fare or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period.***"

"(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

The relevant portion of Section 204a of Part II of the Interstate Commerce Act, June 29, 1949, c. 272, 63 Stat. 280, 49 U.S.C.A. Sec. 304a (2)(5), provides:

"For recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, subject to Paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

(5) "The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

Compare same provisions Federal Power Act 16 USC 824d-e (Appendix Page 36). Contrast provisions Part I of Interstate Commerce Act (Railroads) Sec. 15, as amended Feb. 28, 1920 ch. 91, 41 Stat. 486, 49 USC Sec. 15(7) (Appendix P. 34). Sec. 16 of Part I, Interstate Commerce Act, as amended June 7, 1924, ch. 325, 43 Stat. 633, September 18, 1940, ch. 722, 54 Stat. 913, 49 USC Sec. 16 (Appendix Page 35).

STATEMENT OF THE CASE

This case was brought by Petitioner against Respondent for freight charges under Tucker Act 28 USC Art. 1346 (2).

The case was submitted upon stipulated facts. (R. 17-30) As reflected by the stipulations, the example issue is the following: Respondent made a shipment of scientific instruments over the petitioner from Tinker Air Force Base, Marion, Oklahoma to McClellan Air Force Base, Planehaven, California. This shipment was moved by petitioner and its connecting line from origin via El Paso, Texas to Los Angeles, California. (R. 18) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-I.C.C. No. 31 named a through rate from Marion, Oklahoma to Planehaven, California in the amount of \$10.74 per cwt., which is double first class. (R. 19)

There also appeared a rate in Southwestern Motor Freight Tariff Bureau Tariff 1-5, M.F.-I.C.C. No. 141 naming a rate from Marion, Oklahoma to El Paso, Texas at \$2.56 per cwt. (R. 19)

There was also on file a rate that appeared in Interstate Freight Carriers Conference Tariff No. 1-C, M.F.-I.C.C. No. A-5 naming a rate at \$4.35 per cwt. from El Paso, Texas to Planehaven, California.

T.I.M.E. Incorporated was a party to each of these three tariffs.

Southwestern Motor Freight Tariff Bureau tariffs do not name a rate between Marion, Oklahoma, on the one hand, and between Planehaven, California, on the other hand. (R. 20) The Interstate Freight Carriers Conference tariffs do not name a rate between Marion, Oklahoma and Planehaven, California (R. 20) The Rocky Mountain Motor Tariff Bureau tariff does name a through rate between Marion, Oklahoma and Planehaven, California, but does not name a rate between Planehaven, California and El Paso, Texas nor between Marion, Oklahoma and El Paso, Texas. (R. 20)

The District Court applied the applicable rate. (R. 41) The Court of Appeals directed the District Court to refer the question of reasonableness to the Interstate Commerce Commission. (R. 58)

Petitioner's Petition for Rehearing, (R. 59) was denied. (R. 62) The sole defensive issue presented was that the applicable rate is unreasonable.

REASONS FOR GRANTING OF WRIT

This case presents an important Federal question not heretofore passed on by this Court concerning the law on applicable rates named in Motor Carrier tariffs, and,

equally important, the Federal Court procedure for the determination of a reasonable rate if the applicable rate is attacked.

(1) The Interstate Commerce Commission, in Motor Carrier cases, is without reparation authority. The procedure directed in this case by the Court of Appeals would indirectly grant authority to the Interstate Commerce Commission by aid of a Federal Court to grant reparation on past shipments moving on the applicable rate, which authority and jurisdiction to so grant was withheld by Congress. The Court of Appeals relied on the announced doctrine by this Court stated in *United States vs. Western Pacific R. Co.*, 352 U.S. 59, and applied it to the facts in this case; the Court below sets up a procedure granting possible reparations on past shipments not authorized by Congress (specifically withheld). The Court below is in direct conflict with the holding of this Court in *Montana-Dakota Utilities co. vs. Northwestern Public service Co.*, 341 U. S. 246.

(2) This important Federal procedure question, that is, the reasonableness of an applicable rate being attacked by a shipper, the advisability or lawfulness of holding a case in abeyance in a Motor Carrier case for the sole purpose of submission of the reasonableness of the rate to the Interstate Commerce Commission; the question of granting the Commission, by the directed procedure in the Court below, to indirectly authorize reparation on past shipments.

(3) The direct conflict between the holding of the Court below in this case and the holding of this Court in the *Montana-Dakota* case.

None of these questions have been passed on by this Court.

ARGUMENT

The official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4 (i) reads:

“When a carrier or *carriers* establish a local or joint rate for the application over *any route* from point of origin to destination; such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route.”
(R. 20)

Petitioner contended that the through rate applying in Rocky Mountain Motor Tariff Bureau tariff applies. (R. 20) The respondent, on the other hand, contended that the combination of local or intermediate rates from Marion, Oklahoma to El Paso, Texas and from El Paso, Texas to Planehaven, California applies. (R. 20) The District Court found that the through rate was applicable. (R. 31) This finding was not appealed from.

The respondent filed its Motion to Hold Judgment in Abeyance based upon:

“... the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of the question, which is within the exclusive jurisdiction of the Commission.” (The question being the alleged unreasonableness of the rate applied). (R. 35).

The District Court overruled this motion, (R. 38), and entered its judgment applying the through rate as the applicable rate. (R. 41) The sole question on appeal was the reasonableness of the applicable rate. (R. 44-45) The Circuit Court of Appeals reversed and remanded.

"On consideration whereof, it is now Heard, Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded, to the said District Court with directions to grant the Motion to Hold the Judgment in Abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved." (R. 58)

In the view of petitioner, the opening of our Federal Courts to suits to raise the issue of the reasonableness of *applicable rates* will create a chaotic condition in the Motor Carrier industry in applying its tariff rates. The suggested procedure by the Court below will still leave the question that if the applicable rate is unreasonable: what is a reasonable rate and how can it be determined?

This Court may take judicial knowledge that there are approximately 1,100 carriers members of the Rocky Mountain Motor Tariff Bureau. Sec. 1, Page 4-58, Rocky Mountain Transcontinental Territorial Directory No. 20-B, MF-ICC No. 101. Many of these carriers are not parties to the Southwestern Motor Freight Bureau tariff No. 12-J, MF-ICC No. 255, Page 3-11. Their combination of transcontinental routes are not all via El Paso. Is the rate applicable over one route reasonable by one group of carriers and over another route unreasonable?

The suggested procedure will create an impossible economic condition in applying and collecting applicable rates now on file or approved by the Interstate Commerce Commission, i.e., merely the expense of prosecuting or defending. The ordered procedure will create a multi-

plicity of suits, most times on insignificant amounts, or the accumulation of insignificant amounts to reach the jurisdiction of the Federal Court, in amount, or on a Federal question. The suit will then go to the Federal Court; as ordered it will be held in abeyance for referral to the Interstate Commerce Commission and under the doctrine announced by the Fifth Circuit, the Commission could make a finding that the applicable rate was unreasonable and still leave open the question of what is a reasonable rate.

The Supreme Court of the United States, through its majority, said in *Montana-Dakota Utility Company vs. Northwestern P.S.C.* 341 U.S. 246:

“..... It is admitted, however, that a utility could not institute a suit in a Federal Court to recover a portion of past rates which it simply alleges were unreasonable. It would be out of Court for failure to exhaust administrative remedies, for, at any time in the past, it could have applied for and secured a review and, perhaps, a reduction of the rates by the Commission

It also said:

“..... Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a Court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable"

It also said:

" . . . It is true that in some cases the Court has directed lower federal courts to stay their hands pending reference to an administrative body of a subsidiary question. *Smith vs. Hoboken R.W. & S.S.C. Co.* 328 US 123, 90 L ed 1123, 66 S Ct 947, 168 ALR 497; *Thompson vs. Texas Mexican R. Co.* 328 US 184, 90 L ed 1132, 66 S Ct. 937; *General American Tank Car Corp. vs. El Dorado Terminal Co.* 308 US 422, 84 L ed 361, 60 S Ct. 325. But in all those cases the plaintiff below concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary. In no instance have we directed a court to retain a case in which it could not determine a single one of its vital issues"

It also said:

" . . . If the Court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission

power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent.

"It is urged that this leaves petitioner without a remedy under the Power Act. We agree. In that respect, petitioner is no worse off after losing its lawsuit than its customers are if it wins. Unless we are to assume that this company failed to include its buying costs in its selling rates, we must assume that any unreasonable amounts it paid suppliers it collected from consumers. Indeed, this is the assumption made by the Commission in its brief as *amicus curiae* here. It is admitted that, if it recoups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover.

"Under such circumstances, we conclude that, since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation"

The minority said:

"... Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has

in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed

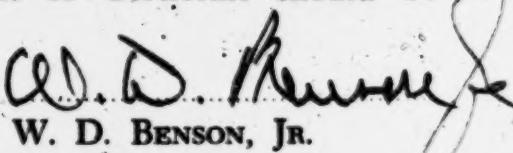
In *United States vs. Western Pacific R. Co.* 352 U.S. 59 followed by the Court below is distinguishable from, and is different from, the facts in the case at bar. This case may be distinguished from Montana-Dakota (1) It applied to rail rates, (2) It involved two limitation statutes, a two-year statute in seeking reparations (Lawfully allowed in Part I of the Interstate Commerce Act), and the limitation upon filing actions in the Court of Claims, and, (3) the issue in the Western-Pacific case was not the reasonableness of the applicable rate. It involved the highly technical question of "what was the applicable rate?", and, (4) the Court directed the referral of a question to the Interstate Commerce Commission which had jurisdiction by original action to determine.

The case at bar involves solely the issue of the reasonableness of the applicable rate.

7.

CONCLUSION

For the reasons setforth above it is respectfully submitted that this Petition for Writ of Certiorari should be granted.



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APPENDIX

Opinion of District Court:

"THE APPLICABLE RATE

The through rate from Marion, Oklahoma, to Planehaven, California published in the Rocky Mountain Motor Tariff Bureau, Tariff 5-A, M.F.-I.C.C. No. 31, is the proper charge for the shipments in question, not only in conformity with the Interstate Commerce Commission, Tariff M.F. 3, Rule 4 (i), but also upon the authority of the only case coming to my notice, which seems directly in point, that is, T. & M. Transportation Co. vs. S. W. Shattuck Chemical Company, 148 Fed. 2d 777. The suggestion of counsel that the aforesaid Tariff M.F. 3, Rule 4 (i), is not applicable to the Government, in view of 31 U.S.C. 71, does not seem sound. There is no such explicit provision in the cited statute. The rule recognized in the decisions is that, in making contracts for the transportation of property by common carriers, the Government stands in the same attitude as any other shipper. Hughes Transportation, Inc. vs. United States, 121 F. Supp. 212.

"THE PLASTIC DOMES

The proper covering classification for this property is that describing 'Airplane Parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates', published in Rocky Mountain Motor Tariff Bureau, Tariff No. 5-A, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15, which is a subject covered in the filed stipulations.

"AIRCRAFT AILERONS"

The proper covering classification for this property is that describing 'Wing panels or sections; in boxes or crates', published in National Motor Freight Classification No. 11, Item 2940, which is a subject covered in the filed stipulations. The Encyclopedia Britannica says that an aileron 'is a movable part of the wing of an aeroplane.'

"The brief of Government counsel has forecast that, presumably, said counsel will now request that judgment herein be held in abeyance while they file an action with the Interstate Commerce Commission to determine the reasonableness or unreasonableness of the through rate herein mentioned, and, ordinarily, in instances somewhat similar, that course has been approved. General American Tank Car Corp. vs. Eldorado Terminal Co., 308 U.S. 422; U. S. vs. Kansas City Southern Ry. Co., 217 Fed. 2d 763. But, in this instance, plaintiff's counsel seems to contend that, in respect to motor carriers, the Interstate Commerce Commission has no authority to decide the reasonableness or unreasonableness of a rate retrospectively as a basis for a reparation ordered by the Commission, or in support of a suit to recover an alleged overcharge by judicial judgment. This seems doubtful to me, just on the face of it, but I have not gone into the question closely, and if Government counsel do move to hold this case at rest, pending action before the Commission, then I would want to know whether such an order would serve any useful purpose, and, consequently, a thorough brief should be presented on the question above mentioned.

“Awaiting replies from respective counsel, I am,

Sincerely yours,

/s/ Jos. B. Dooley

United States District Judge”

“DEFENDANT’S MOTION TO HOLD JUDGMENT IN ABEYANCE:

“Filed: July 18, 1956

“Comes now, United States of America, defendant and cross plaintiff in the above numbered and entitled cause and respectfully moves the Court to hold in abeyance the entry of judgment herein for the length of time hereinafter set out, and for the following reasons:

1.

“This action was commenced by T.I.M.E. Incorporated, plaintiff, to recover from the United States of America, defendant, certain transportation charges on shipments originating at Marion, Oklahoma, and transported by plaintiff through El Paso, Texas, to Planehaven, California. In its answer defendant alleged that the aggregate of intermediate rates to and from El Paso is the applicable rate to said shipments rather than the through rate contained in Rocky Mountain Tariff Bureau as applied by T.I.M.E. Incorporated. The Court has determined this question adversely to the Government.

“In addition to its contention as to the applicable rate, defendant alleged that such through rate is *prima facie* unreasonable and, therefore, unlawful

to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso. Since this Court does not have jurisdiction to determine the reasonableness or unreasonableness of the rate to be applied, the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of that question, which is within the exclusive jurisdiction of the Commission.

2.

"The United States of America has not filed an action before the Commission for such determination because of its contention that the only rate applicable to the forms in question is the aggregate of the intermediates, and no action before the Commission could be commenced until this Court had determined the applicable rate.

3.

"No hardship will fall on plaintiff by the Court's delay since even under the Court's adverse decision the Government will be entitled to a money judgment.

"WHEREFORE, the United States of America respectfully moves the Court to hold the entry of judgment in this case in abeyance for a period of sixty days from the granting of this motion, to afford her an opportunity to apply to the Interstate Commerce Commission for a determination of the reasonableness or unreasonableness of the rate which the Court

deems applicable to the shipments involved herein and if such proceeding is commenced within such sixty day period then to continue to hold the judgment in abeyance until the Commission has finally determined the reasonableness or unreasonableness of the applicable rate.

Respectfully submitted,

Heard L. Floore
United States Attorney

/s/ John A. Lowther,
John A. Lowther, Assistant
United States Attorney"

**"OPINION OF DISTRICT COURT ON MOTION
TO HOLD IN ABEYANCE:**

"The defendant's motion to hold the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission is overruled and such an order should be presented promptly.

"This ruling results from the conclusion that Montana-Dakota Utilities Co. vs. Northwestern Public Service Co., 341 U. S. 246, and McClellan vs. Montana-Dakota Utilities Co., 104 F. Supp. 46, affirmed 204 F. 2d 166, certiorari denied 346 U. S. 826, are decisive against said motion.

"Ordinarily the Interstate Commerce Commission, like the United State Maritime Commission (Shipping Act, U. S. Code, Title 46, Para. 817 and 821), in con-

nection with reparation authority, may review the reasonableness of rates charged in past shipments. This is true in respect to railroads, (Interstate Commerce Act, U. S. Code, Title 49, Para. 13 (1)), and with respect to water carriers, (Interstate Commerce Act, U. S. Code, Title 49, Para. 907 (b) and 908 (b), (c), (d)), but that jurisdiction is lacking in respect to motor carriers (Interstate Commerce Act, U. S. Code, Title 49 Para. 316 (e)). The Civil Aeronautics Board, as the administrative agency over the air carriers, has no reparation authority nor jurisdiction to review rates as to past transportation, (Civil Aeronautics Act, U. S. Code, Title 49, Para. 642 (d)). The same limitation of authority is found in the Natural Gas Act, U. S. Code, Title 15, Para. 717d (a), and in the Federal Power Act, U. S. Code, Title 16, Para. 824e (a). The legislative policy for these differences may not be evident, but there can be no doubt that the distinction is clearly manifested.

"The Montana-Dakota Utilities Co. vs. Northwestern Public Service Co. case arose under the Federal Power Act and it will be noticed that the crucial statutory article cited in that decision in the presently material part is virtually word for word the same as the parallel statutory article dealing with motor carriers. In other words, I am unable to see any substantial difference in principle between that case and the present suit. Moreover, the denial of the present motion is also supported in Slick Airways vs. American Airlines, 107 F. Supp. 199, 212, where the court said 'if the instant complaint merely sought to recover

damages under the Civil Aeronautics Act on account of unfair competitive practices committed, or unreasonable rates charged, by defendants, I would agree that it would not state a cause of action in this court.'

"It is true that the action on the present motion is contrary to the decision in Bell Potato Chip Co. vs. Aberdeen Truck Lines, 43 M.C.C. 337, which was decided before the Montana-Dakota case, and, likewise, contrary to the decision in New York-New Brunswick Auto Express Co. Inc. vs. The United States, 126 F. Supp. 215, cited by Government counsel, as well as the strongest case for the Government, United States vs. Garner, 134 F. Supp. 16, but the Montana-Dakota case was not mentioned in either of the two opinions and probably did not come to the notice of the Court.

Sincerely yours,

/s/ Jos. B. Dooley

United States District Judge"

"JUDGMENT OF DISTRICT COURT:

"On this day came on to be considered the above styled cause; the Court having tried the case in June of 1956 and having considered the evidence, the stipulation and contentions of the respective parties, and the defendant having filed its motion to hold the entry of judgment in abeyance pending the instituting

of proceedings before the Interstate Commerce Commission, and it appearing that such motion should be overruled, the Court finds:

"That the through rate from Marion, Oklahoma to Planehaven, California published in Rocky Mountain Motor Tariff Bureau, Tariff 5-A, M.F.-I.C.C. No. 31, is the only proper charge for the shipments in question, in conformity with the Interstate Commerce Commission Tariff Circular M.F. No. 3, Rule 4(i), and that Rule 4(i) is applicable to the Government.

"The Court further finds that the proper covering classification for a shipment of 'Domes, Airplane, Cellulose, Derivatives, Plastic and Metal Combined' is 'Airplane parts, NOI; made of plastics, synthetic gums or resins, in boxes or crates', as published in Rocky Mountain Motor Tariff Bureau 5A, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15.

"The Court further finds that the proper covering classification on a shipment billed as '8 boxes aircraft ailerons' is covered in the tariff described as 'wing panels or sections; in boxes or crates', as published in National Motor Freight Classification No. 11, Item 2940.

"The Court is of the opinion that the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission should be overruled and that jurisdiction is lacking in the Interstate Commerce Commission in respect to Motor Carriers to review the reasonableness of rates charged on past shipments.

"It is, therefore, ORDERED, ADJUDGED AND DECREED BY THE COURT AS FOLLOWS:

(a) That the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission is overruled.

(b) That the defendant, United States of America, owes plaintiff, T.I.M.E. Incorporated the sum of \$14,414.82, and that plaintiff, T.I.M.E. Incorporated is indebted to the defendant, United States of America, in the sum of \$16,942.03, and accordingly the defendant, United States of America, on its cross action against T.I.M.E. Incorporated is awarded judgment against plaintiff, T.I.M.E. Incorporated for the sum of \$2,527.21.

(c) That each party hereto pay the costs incurred by it.

(d) That all other relief herein prayed for is hereby specifically denied.

Entered this the 5th day of March, 1957.

/s/ Jos. B. Dooley

United States District Judge"

In the
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 16738

UNITED STATES OF AMERICA,

Appellant,

versus

T.I.M.E., INCORPORATED,

Appellee

*Appeal from the United States District Court for the
Northern District of Texas.*

(January 30, 1958.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges: T.I.M.E., Incorporated, a motor carrier, sued the United States under the Tucker Act¹ for unpaid transportation charges on shipments of freight. The United States asserted counterclaims upon which the district court held that it was entitled to \$16,942.03, and that holding is not contested on appeal.

¹ 28 U.S.C.A. Sec. 1346, (a)(2).

This appeal involves solely the question of the correctness of the district court's determination that T.I.M.E. was entitled to a total of \$14,414.82 on its claims.

The facts were stipulated. T.I.M.E. was a common carrier motor carrier operating generally between Oklahoma City, Oklahoma and Los Angeles, California via El Paso, Texas, under authority of the Interstate Commerce Commission. It transported some twenty shipments of scientific instruments under Government bills of lading. A typical shipment illustrates the issues with respect to all of the shipments: it originated at Tinker Air Force Base, Marion, Oklahoma, and was transported over the lines of T.I.M.E. and a connecting carrier to McClellan Air Force Base at Planehaven, California.

At the time, there were on file with the Interstate Commerce Commission the following tariffs to which T.I.M.E. was subject:

- (1) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-ICC No. 31, providing a double first-class through rate of \$10.74 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to Planehaven, California.
- (2) Southwestern Motor Freight Bureau Tariff No. 1-F, M.F.-ICC No. 141, providing a rate of \$2.56 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to El Paso, Texas.
- (3) Interstate Freight Carriers Conference Tariff No. 1-C, N.F.-ICC No. A-5, providing a rate of \$4.35 per cwt. on scientific instruments N.O.I. from El Paso, Texas to Planehaven, California.

The through rate, \$10.74, was thus considerably in excess of the sum of the intermediate rates, \$6.91. There was, however, on file with the Commission the official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4(i), which reads:

“(i) When a carrier or carriers establish a local or joint rate for application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route.”

The Government had paid the intermediate rates. The district court held that T.I.M.E. was entitled on its claims to a total of \$14,414.82, the difference between the through rate and the aggregate of the intermediate rates.² The Government made some contention at the trial that the combination of the intermediate rates is applicable, but that position is not urged on appeal. The Government's main defense, which it continues to urge in this Court, is that the through rate is *prima facie* unreasonable and unlawful to the extent that it exceeds the aggregate of the intermediate rates, and that the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness or unreasonableness of the rate to be applied.

² Because of the larger amount of the Government's counterclaims, \$16,942.03, not now in issue, judgment was entered in favor of the United States in the amount of \$2,527.21.

Under Tariff M.F.-3, Rule 4(i), quoted *supra*, the fact that the through rate is higher than the aggregate of the intermediate rates does not prevent it from being the applicable rate of the carrier. The Commission has often ruled, however, that through rates are *prima facie* unjust and unreasonable to the extent that they exceed the combination of local rates from and to the same points.³

Section 216 (c) of the Interstate Commerce Act, 49 U.S.C.A. 316(c), provides that: "Common carriers of property by motor vehicles may establish reasonable through routes and joint rates, charges, and classifications" with other carriers. Section 216 (d), 49 U.S.C.A. 316(d), provides that: all carges of motor carriers for services covered by the Act "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." Section 204(c), 49 U.S.C.A. 304 (c), provides that: upon complaint or upon its own initiative the Commission may investigate whether any motor carrier has failed to comply with any provision of the chapter or with any requirement established pursuant thereto, and issue an appropriate order to compel compliance.

Section 13, et seq. of the Act, 49 U.S.C.A. 13, et seq., dealing with railroads, gives the Commission authority to award reparations, subject to a two-year limitation period, Section 16 (3), 49 U.S.C.A. 16(3); but part II

³ See Kingan & Co. v. Olson Transportation Co., 32 M.C.C. 10; Stokely Foods, Inc. v. Foster Freight Line, Inc., 62 M.C.C. 179; United States v. Davidson Transfer & Storage Co., Inc., No. MC-C-1849, decided October 14, 1957.

of the Act covering motor carriers contains no similar provision. Nevertheless, the Commission has consistently held that the general powers conferred upon it in the sections already mentioned and in other sections furnish authority to determine the reasonableness of a past rate, the lawfulness of which is brought into issue in a judicial proceeding.

Holdings to that effect had been made in a long line of decisions by divisions of the Commission.⁴ In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, the full Commission undertook a "thorough re-examination" of its authority to "make an administrative determination of the lawfulness of rates charged on past shipments," and concluded that the earlier decisions of its divisions were correct. The opinion in the *Bell Potato Chip Co.* case, *supra*, was reconsidered at length and approved by the Commission in the very recent case of *United States v. Davidson Transfer & Storage Co., Inc.*, No. M-C-1849, decided October 14, 1957.

This construction of the Act by the body charged with primary responsibility for its administration is, of course, entitled to great weight by the courts.⁵ Following such

⁴ See *W. A. Barrows Porcelain Enamel Co. v. Cushman M. Delivery*, 11 M.C.C. 365, 367; *Hausman Steel Co. v. Seaboard Freight Lines, Inc.*, 32 M.C.C. 31; *Dixie Mercerizing Co. v. ET and WNC Motor Transp. Co.*, 21 M.C.C. 491, affirmed on reconsideration, 41 M.C.C. 355; *Koppers Co. v. Langer Transport Corp.*, 12 M.C.C. 741; *Hill-Clarke Machinery Co. v. Webber Cartage Lines, Inc.*, 26 M.C.C. 144; *Patten Blinn Lbr. Co. v. Southern Arizona Freight Lines*, 31 M.C.C. 716.

⁵ See *United States v. Bergh*, 1956, 352 U.S. 40, 47; *Adams v. United States*, 1943, 319 U.S. 312, 314-315; *United States v. Citizens Loan & Trust Co.*, 1942, 316 U.S. 209, 214; *Inland Waterways Corp. v. Young*, 1940, 309 U.S. 517; *United States*

construction, the Court of Claims and another district court have looked to the Commission for aid in the disposition of suits involving past motor carrier rates alleged to be unreasonable.⁶

The district court in the present case thought that the case of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, precluded it from holding the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission. That was a five-to-four decision in which the majority held that the complaint stated no federally cognizable cause of action to which the referred issue was subsidiary. After full discussion, that case was distinguished in the report of the Commission in *United States v. Davidson Transfer & Storage Co., Inc.*, *supra*, with the conclusion that:

“ * * * However, we do not interpret the *Montana-Dakota* case as holding that where a cause of action to which the issue of reasonableness is subsidiary is maintainable in the court in which it is brought, reasonableness issue may not be determined by the proper administrative body.”

In *United States v. Western Pacific R. Co.*, 1956, 352 U. S. 59, 72, it was argued that, because Section 16 (3)

v. American Trucking Associations, Inc., 1940, 310 U.S. 534, 549; *United States v. Madigan*, 1937, 300 U.S. 500, 506; *Norwegian Nitrogen Co. v. United States*, 1933, 288 U.S. 294, 315; *United States v. Jackson*, 1930, 280 U.S. 183, 193; *Edwards's Lessee v. Darby*, 1827, 12 Wheat. (25 U.S.) 207, 210.

⁶ *New York & New Brunswick Auto Express Co. v. United States*, Ct. of Cl. 1954, 126 F. Supp. 215; *United States v. Garner*, E.D.N.C. 1955, 134 F.Supp. 16.

of the Act prevented the Commission from considering complaints for overcharges against railroad carriers not filed within two years from the time the cause of action accrued, that the Commission was barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions came to the Commission by way of referral or an original suit. The Supreme Court held:

" * * * that the limitation of Sec. 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commissions' primary jurisdiction, as were these questions relating to the applicable tariff."

United States v. Western Pacific R. Co., supra at p. 74

The case of *United States v. Chesapeake & Ohio R. Co.*, 1956, 352 U.S. 77, 81, decided on the same day, is to the same effect. From those decisions, it would seem to follow that the Commission's lack of power to award reparations does not negative its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable cause of action pending in court.

Congress undertook, in terms, to save existing common law and statutory rights and remedies. Section 216 of the Act, 49 U.S.C.A. 316, relating to the duty to establish reasonable rates, concludes with a provision that: "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent here-

with." Very clearly, the district court could not itself undertake an independent investigation into the reasonableness of the rate. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. The court, then, had the alternative either of denying the shipper any remedy against a filed rate, which on its face was *prima facie* unreasonable and unlawful, or of holding its judgment in abeyance to permit a determination of the reasonableness of the rate by the Interstate Commerce Commission. In our opinion, the second alternative is more consistent with justice, with the terms of the Interstate Commerce Act, and with the cases. The judgment of the district court is, therefore, reversed and the cause remanded with directions to grant the motion to hold the judgment in abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved.

REVERSED AND REMANDED WITH DIRECTIONS.

Part I, I.C.C. Act (Rail Carriers):

The relevant portion of Section 15 of Part I of the Interstate Commerce Act, as amended February 28, 1920, c. 91, 41 Stat. 486, 49 U.S.C.A. Sec. 15 (7) provides:

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers, affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made

within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.***"

The relevant portion of Section 16 of Part I of the Interstate Commerce Act, as amended June 7, 1924, c. 325, 43 Stat. 633, September 18, 1940, c. 722, 54 Stat. 913, 49 U.S.C. 16 (3)(b) provides:

(3)(b) "All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) "For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the

two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(g) "The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission."

POWER ACT:

The relevant portion Sec. 205a et seq. of the Act, 49 Stat. 851, ch. 687, 16 USC, Sec. 824d (a) etseq (16 USCA 824d (a) - (c) P. 624):

"824d. Rates and charges; schedules; suspension of new rates,

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the law-

fulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions

preference over other questions pending before it and decide the same as speedily as possible. June 10, 1920, c. 285, Para. 205, added August 26, 1935, c. 687, Title II, Para. 213, 49 Stat. 851."

Sec. 206 (a); 49 Stat. 852, ch. 687, 16 USC 824e (a)-(b), (16 USCA 824e P. 625).

"824e. Power of Commission to fix rates and charges; determination of cost of production or transmission,

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, reasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State Commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. June 10, 1920, c. 285, Para. 206, added Aug. 26, 1935, c. 687, Title II, Para. 213, 49 Stat. 852."

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5

Statutes:

Interstate Commerce Act, Part II, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*

2

Transportation Act of 1940, Section 322, 54 Stat. 955, 49 U. S. C. 66.

2

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 68

T. I. M. E., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas is unreported. The opinion of the Court of Appeals (Pet. App. pp. 26-33) is reported at 252 F. 2d 178.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1958. A timely petition for rehearing was denied on February 25, 1958. The petition for a writ of certiorari was filed on May 26, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether in a suit by a motor carrier to recover charges allegedly due, which is defended on the ground that those charges are unreasonable, the court must stay its hand and refer the "reasonableness" question to the Interstate Commerce Commission.

STATUTES INVOLVED

The relevant provisions of Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. 66, and of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*, are set forth in the appendix to the Government's brief in opposition in *Davidson Transfer and Storage Co. v. United States*, No. 96, this Term.

STATEMENT

This suit was instituted by petitioner, T. I. M. E., Inc., under the Tucker Act, to recover a certain sum allegedly due it in connection with the transportation of Government property. The United States defended on the principal ground that the rate used by petitioner in computing its charges was *prima facie* unreasonable, and moved that the proceedings be suspended to enable a reference of the "reasonableness" issue to the Interstate Commerce Commission. The District Court denied the motion and entered judgment on the basis that petitioner was entitled to the challenged rate. The Court of Appeals reversed and remanded with instructions to grant the Government's

motion. The stipulated facts, and the proceedings below, may be summarized as follows:

Petitioner, a motor carrier operating between Oklahoma City, Oklahoma and Los Angeles, California, via El Paso, Texas, transported several shipments of scientific instruments N. O. I. (not otherwise indexed) under Government bills of lading (R. 18). One of the these shipments, which the parties agreed was illustrative and did not differ in material respect from the other shipments, originated at Tinker Air Force Base, Marion, Oklahoma (R. 18). It was transported over the lines of petitioner and a connecting carrier from that point to McClellan Air Force Base at Planehaven, California (R. 18-19).

At the time of this movement, there were on file with the Interstate Commerce Commission these tariffs to which petitioner was subject (R. 19).

(1) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M. F.-ICC No. 31, providing a double first class through rate of \$10.74 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma to Planehaven, California.

(2) Southwestern Motor Freight Bureau Tariff No. 1-F, M. F.-ICC No. 141, providing a rate of \$2.56 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma, to El Paso, Texas.

(3) Interstate Freight Carriers Conference Tariff No. 1-C, N. F.-ICC No. A-5, providing a rate of \$4.35 per cwt. on scientific instruments N. O. I. from El Paso, Texas to Planehaven, California.

In the District Court, the Government contended that the applicable rate was a combination of the intermediate rates from Marion, Oklahoma to El Paso, Texas and from El Paso to Planehaven, California, *i. e.*, a sum of \$6.91 per cwt. It further urged that, if the court should determine that the through rate (\$10.74 per cwt.) between Marion and Planehaven was applicable as a matter of tariff construction, the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness of that rate as applied.

Petitioner, on the other hand, asserted that the through rate was applicable (R. 20). With respect to holding the proceedings in abeyance to permit a determination of the reasonableness of the through rate as so applied, petitioner contended that the court lacked the power to do so (R. 21-22).

On June 30, 1956, the District Court ruled that the through rate was applicable (R. 31-32). On July 18, 1956, the Government moved to hold the entry of judgment in abeyance to enable it to apply within sixty days to the Interstate Commerce Commission for a determination of the reasonableness of that rate as so applied (R. 34). On December 29, 1956, the court denied the Government's motion on the ground that the Commission does not have jurisdiction to review the reasonableness of rates charged on past shipments by motor carriers. (R. 38-39). On March 5, 1957, judgment was entered for petitioner on its claims in the amount of \$14,414.82

(i. e., the difference between the through rate and the aggregate of the intermediate rates) (R. 41-43).¹

On the Government's appeal, restricted to the referral issue, the Court of Appeals reversed. The case was remanded with directions to grant the Government's motion to hold judgment in abeyance in order to give the Government an opportunity to obtain a determination from the Interstate Commerce Commission as to the reasonableness of the through rate as applied.

The court held, citing *United States v. Western Pacific R. Co.*, 352 U. S. 59, 72 and *United States v. Chesapeake & Ohio R. Co.*, 352 U. S. 77, 81, that the Commission's lack of power to award reparations to shippers by motor carrier does not negative its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable ~~cause~~^{cause} of action pending in a district court (Pet. 26-33).

ARGUMENT

The single issue raised by the petition in this case is the same as the first issue presented in *Davidson Transfer & Storage Company, Inc. v. United States*, pending on petition for a writ of certiorari, No. 96, this Term. For the reasons set forth in our brief in opposition in the *Davidson Transfer & Storage Company* case, we respectfully submit that the petition

¹ Because a larger judgment was entered on the Government's counterclaims (\$16,942.03), the United States obtained a net recovery (R. 42).

for a writ of certiorari in the instant case should be denied.

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Attorneys.

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No. 18

In The

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1958

T.I.M.E. INCORPORATED

Petitioner and Appellee Below,

vs.

UNITED STATES OF AMERICA

Respondent and Appellant Below.

BRIEF OF PETITIONER

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Interstate Commerce Commission Tariff

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No. 68

In The

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1958

T.I.M.E. INCORPORATED

Petitioner and Appellee Below.

vs.

UNITED STATES OF AMERICA

Respondent and Appellant Below.

BRIEF OF PETITIONER

**TO THE HONORABLE EARL WARREN, CHIEF
JUSTICE OF THE UNITED STATES, AND THE
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:**

Your Petitioner, T.I.M.E. Incorporated, respectfully shows:

OPINIONS OF THE COURT BELOW

The opinion of the United States District Court for the Northern District of Texas is unreported, but is found in the Record at Pages 19-21, 23 and appended hereto (Appendix P. 27, 31). The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 252 Federal Reporter, Second Series, Page 178, and is found in the Record at Page 29 and is appended hereto. (Appendix P. 36).

JURISDICTION

The date of the judgment of the Court below is January 30, 1958, Motion for Rehearing overruled February 25, 1958 (R. 37). Petition filed the 26th day of May, 1958; Writ granted October 13, 1958. (R. 37).

This Court has jurisdiction under Title 28, Section 1254, (1) of the United States Code and is provided for under the rules of this Court in Rule 19, 1 (b).

QUESTIONS FOR REVIEW

The basic questions for review may be stated thus:

(1) In a suit on past shipments instituted by a Motor Carrier operating in interstate commerce under the authority of the Interstate Commerce Commission against a shipper (United States of America) upon the *applicable* rate provided for in its tariffs, may the sole defense by

the shipper that the applicable rate is unreasonable, require referral of the question of the reasonableness of the applicable rate to the Interstate Commerce Commission.

Restated:

In the absence of Reparation authority in the Interstate Commerce Commission in Motor Carrier cases, may the defense, in a suit upon an applicable rate, that the applicable rate is unreasonable and being the sole issue involved, be referred to the Interstate Commerce Commission for the determination of unreasonableness alone.

(2) The procedure for determining a reasonable rate on Motor Carrier shipments:

(a) Following administrative procedure of statute?
or;

(b) Failing to use Statute, and referral for Reparations?

4.

STATUTES APPLICABLE

The relevant portion of Section 217 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 560, 49 U.S.C.A. Sec. 317(a), (b) and (c) provides:

"(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier,"

"(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs; Provided, that the provisions of Section 1 (7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

"(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with Paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such a change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions."

The relevant portion of Section 222 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 564, 49 U.S.C.A. Sec. 322 (b) and (c), Provides:

“(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term or condition:”

“(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who . . . shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare or charge . . . shall be deemed guilty of a misdeameanor and upon conviction thereof be fined not more than \$500 for the first offense and not more than \$2,000 for any subsequent offense.”

The relevant portion of Section 216 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 558, 49 U.S.C.A. Sec. 316(e), (g) and (j) provides:

“(e) Any person, state board, organization, or body politic may make complaint in writing to the Commission

*Statutory administrative remedy

sion that any such rate, fare, charge, classification, rule, regulation or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 317 of this title. Whenever, after hearing . . . the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare or charge for the maximum or minimum, or maximum and minimum rate, fare or charge *thereafter* to be observed, or the lawful classification, rule, regulation, or practice *thereafter* to be made effective

"(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare or charge, or the value of the service thereunder, the Commission is authorized

and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare or charge, or such rule, regulation or practice, and pending such hearing, and the decision whereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement, in writing, of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare or charge, or such rule, regulation or practice, but not for a longer period than seven months, beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare or charge, or classification, rule, regulation or practice, shall go into effect at the end of such period

“(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.”

The relevant portion of Section 204a of Part II of the Interstate Commerce Act, June 29, 1949, c. 272, 63 Stat. 280, 49 U.S.C.A. Sec. 304a (2) (5), provides:

"For recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, subject to Paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

"(5) The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

Compare same provisions Federal Power Act 16 USC 24-d-e (Appendix Page 46). *Contrast* provisions Part I of Interstate Commerce Act (Railroads) Sec. 15, as amended Feb. 28, 1920 ch. 91, 41 Stat. 486, 49 USC Sec. 5(7) (Appendix P. 44). Sec. 16 of Part I Interstate Commerce Act, as amended June 7, 1924, ch. 325, 43 Stat. 633, September 18, 1940, ch. 722, 54 Stat. 913, 49 USC Sec. 16 (Appendix Page 45).

STATEMENT OF THE CASE

This case was brought by Petitioner against Respondent for freight charges under Tucker Act 28 USC Art. 346 (2).

The case was submitted upon stipulated facts. (R. 9) As reflected by the stipulations, the example issue is the following: Respondent made a shipment of scientific instruments over the Petitioner from Tinker Air Force Base,

Marion, Oklahoma, to McClellan Air Force Base, Planehaven, California. This shipment was moved by Petitioner and its connecting line from origin via El Paso, Texas, to Los Angeles, California. (R. 9) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-I.C.C. No. 31 named a through rate from Marion, Oklahoma, to Planehaven, California, in the amount of \$10.74 per cwt., which is double first class. (R 10).

There also appeared a rate in Southwestern Motor Freight Tariff Bureau Tariff 1-5, M.F.-I.C.C. No. 141 naming a rate from Marion, Oklahoma, to El Paso, Texas, at \$2.56 per cwt. (R 10)

There was also on file a rate that appeared in Interstate Freight Carriers Conference Tariff No. 1-C, M.F.-I.C.C. No. A-5 naming a rate at \$4.35 per cwt. from El Paso, Texas, to Planehaven, California. (R. 10)

T.I.M.E. Incorporated was a party to each of these three tariffs.

Southwestern Motor Freight Tariff Bureau tariffs do not name a rate between Marion, Oklahoma, on the one hand, and between Planehaven, California, on the other hand. (R 11) The Interstate Freight Carriers Conference tariffs do not name a rate between Marion, Oklahoma, and Planehaven, California. (R 11) The Rocky Mountain Motor Tariff Bureau tariff does name a through rate between Marion, Oklahoma, and Planehaven, California, but does not name a rate between Planehaven, California, and El Paso, Texas, nor between Marion, Oklahoma, and El Paso, Texas. (R 11)

The official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4(i) reads:

"When a carrier or *carriers* establish a local or joint rate for the application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route." (R. 11)

Petitioner contended that the through rate applying in Rocky Mountain Motor Tariff Bureau tariff applies. (R. 11) The Respondent, on the other hand, contended that the combination of local or intermediate rates from Marion, Oklahoma, to El Paso, Texas, and from El Paso, Texas, to Planehaven, California applies. (R. 11) The District Court found that the through rate was applicable. (R. 25) This finding was not appealed from.

The Respondent filed its Motion to Hold Judgment in Abeyance based upon:

"... the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of the question, which is within the exclusive jurisdiction of the Commission." (The question being the alleged unreasonableness of the rate applied.) (R. 22).

The District Court overruled this motion, (R. 26), and entered its judgment applying the through rate as the applicable rate. (R. 25). The sole question on appeal was the reasonableness of the applicable rate. (R. 27). The Circuit Court of Appeals reversed and remanded.

"On consideration whereof, it is now Heard, Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is here-

by remanded, to the said District Court with directions to grant the Motion to Hold the Judgment in Abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved." (R. 35).

Petitioner's Petition for Rehearing, (R. 36) was denied: (R. 37). The sole defensive issue presented was that the applicable rate is unreasonable.

Petition filed for Certiorari and granted October 13, 1958. (R. 37).

SUMMARY OF ARGUMENT

Congress withheld Reparation authority in Motor Carrier Cases (49 U.S.C.A. 316 e, g, h). The Courts, likewise, do not have Reparation authority and such authority may not be granted by improvisation. *Montana-Dakota Utilities Co. vs. Northwestern Public Service Co.*, 341 US 246; 95 Led 912; 71 S Ct 692.

Administrative remedies must be exhausted before seeking redress in Court. *Myers vs. Bethlehem Shipbuilding Co.*, 303 US 41; 82 Led 638; 58 S Ct 459.

The rate filed or approved in a tariff is the only legal rate, and it is presumed reasonable. *Keogh vs. Chicago and N. W. Co.*, 260 US 156; 67 Led 183; 43 S Ct 362.

A tariff must be in existence. It cannot be created by piecing out of other tariffs. *Baltimore & O. S. W. R. Co. vs. Settle*, 260 US 166; 67 Led 189; 43 S Ct 28.

The Interstate Commerce Commission, by the exercise of its quasi-legislative authority concerning reasonableness or lawfulness of rates, cannot retro-actively change its decree on past rates. *Arizona Grocery Co. vs. Atcheson T & S. F. R. Co.*, 284 US 370; 76 Led 348; 52 S Ct 183.

ARGUMENT

This case involves Reparations on past shipments. It involves procedure fixed by Statute contrasted with a suggested vague Commission-Court improvisation to deal with determining of rates concerning past shipments; thus, it involves the exhausting or ignoring of the administrative remedies set by Congress.

The Interstate Commerce Commission came into existence by an Act of Congress. Its powers are Statutory alone. They were enlarged by the Motor Carrier Act (ICC Act, Part II). It must follow that the Commission only has the powers granted to it.

The Commission was given a specific Statutory power to fix rates. Congress, in this Statute, outlined and directed the administrative procedure to fix rates. It did not grant to either the Commission or the Courts Reparation authority. The sole contention of the Respondent on the merits of this case is the contention that a rate in a joint-through tariff which exceeds the aggregate of rates in territorial tariffs are *prima facie* unreasonable.

The misconstruction, misinterpretation, or ignoring of the holding of this Court in *Montana-Dakota Utilities Co. vs. Northwestern Public Service Co.*, 341 US 246, 95 Led 912, 71 S Ct 692, and *McClellan vs. Montana-Dakota Utilities Co.*, 104 F Supp 46, affirmed 204 Fed 2d 166, *Certiorari denied*, 346 US 826, should warrant this Court to

put forever at rest the question of whether Reparations are to be obtained in Motor Carrier cases by means of indirect action through the Courts, Federal or State. (In addition to the T.I.M.E. and Davidson cases here involved, see *New York, Susquehanna & Western Railroad Co. vs. Follmer*, 254 Fed 2d 510 (512).

Moreover, this Court should forever foreclose the idea that a shipper, not having exhausted the statutory administrative remedies available to it, may question, by Court Action, the reasonableness of an *applicable* rate, approved or filed by the Interstate Commerce Commission.

The Supreme Court of the United States, through its majority, said in *Montana-Dakota Utilities Co. vs. Northwestern P.S.C.*, 341 US 246:

“ . . . It is admitted, however, that a utility could not institute a suit in a Federal Court to recover a portion of past rates which it simply alleges were unreasonable. It would be out of Court for failure to exhaust administrative remedies, for, at any time in the past, it could have applied for and secured a review and, perhaps, a reduction of the rates by the Commission . . . ” (250)
It further stated that:

“ . . . Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a Court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that except for review of the Commission's orders, the Courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable" (251, 2).

Continuing, the Court noted:

"... It is true that in some cases the Court has directed lower Federal Courts to stay their hands pending reference to an administrative body of a subsidiary question. Smith vs. Hoboken R. W. & S. S. Co., 328 US 123, 90 Led 1123, 66 S Ct 947, 168 ALR 497; Thompson vs. Texas Mexican R. Co., 328 US 134, 90 Led 1132, 66 S Ct 937; General American Tank Car Corp. vs. El Dorado Terminal Co., 308 US 422, 84 Led 361, 60 S Ct 325. But in all those cases the plaintiff below concededly stated a federally cognizable cause of action, to which the referred issue was a subsidiary. In no instance have we directed a Court to retain a case in which it could not determine a single one of its vital issues . . ." (253)

Finally, it pointed out that:

"... If the Court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the Court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot them-

selves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent. (254)

"It is urged that this leaves Petitioner without a remedy under the Power Act. We agree. In that respect, a Petitioner is no worse off after losing its lawsuit than its customers are if it wins. Unless we are to assume that this company failed to include its buying costs in its selling rates, we must assume that any unreasonable amounts it paid suppliers it collected from consumers. Indeed, this is the assumption made by the Commission in its brief as *amicus curiae* here. It is admitted that, if it recoups again what it has already recouped from the public, there is no machinery in or out of Court by which others who have paid unreasonable charges to it can recover. (254)

"Under such circumstances, we conclude that, since the case involves only issues which a Federal Court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation . . ." (255)

The minority said:

" . . . Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either Court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of

damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed . . ." (258).

Under the holding of the Fifth Circuit in the present case (and also the District of Columbia Circuit in the Davidson case) however, a shipper (any shipper — not just the United States) is told that he may engage in commerce for years on an applicable rate, which he neither protested when filed nor complained of to the Commission (the administrative remedy authorized by the Statutes of the United States, Articles 316 e.g.,) and then, if he thinks the rate is too high — that it is unreasonable — he may refuse to pay, or pay the rate and institute a suit for Reparations.

This holding allows the shipper to ignore the administrative procedure set up by Congress. Indeed, it allows the shipper to engage in commerce for a number of years under the assumption that his costs are passed on to his customers, and then *benefit*, if successful, by a refusal to follow the administrative procedure set forth in the law.

The Court below, by its referral in this particular case submitting solely the reasonableness of the rate, poses an additional question as to how a reasonable rate is to be set. Shall it be set as provided by Statute for all, or shall it be set by Court law assisted by the Commission in a particular case between individual parties?

The amount of the charge, whether small in cents or large in dollars, is immaterial. The law, providing penalties, requires both the carrier to ~~collect~~ and the shipper to pay the applicable rate (Interstate Commerce Act, Part II, Sec. 217.). To illustrate, a contract of shipment (bill of lading) is executed by the parties. Upon

presentation of the cost bill, determined by the applicable tariff rates, the shipper refuses to pay, using as an excuse the argument that the applicable rate is unreasonable (too high, too low, non-competitive; discriminatory, etc.) The carrier sues under the compulsion of avoiding the penalty, or simply because of a willingness or eagerness to comply, as a carrier, with the law and the lawful regulations of the Interstate Commerce Commission. (In the present case, because of accumulations, the amount involved is \$14,000.00, but common experience dictates small amounts.) Alternatively, the shipper may pay the rate he contracted to pay and then sue the carrier for return of a portion of the charge already paid (the Davidson case), basing suit on a simple allegation of an unreasonable rate. (Emphasized by Continental Can Co. vs. T.I.M.E., No. 2501, filed in District Court, Northern District of Texas, now pending by referral following the Court below, in I.C.C. Docket 32518).

Equal, uniform justice demand equal, uniform decisions. There can be but one law for all carriers and for all shippers. But here, conceivably, in a suit for \$7.60 in a Texas Justice of the Peace Court, Small Claims Court, or in a Municipal Court, a shipper might claim a charge to be unreasonable. Yet the law is quite clear that such a forum or forums, including the Federal Court, cannot have jurisdiction to determine the rate. This Court, in *Keogh vs. Chicago & N.W. R. Co.*, 260 US 151 (163), 43 S Ct 47, said:

"The legal rights of a shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot

be varied or enlarged by either contract or tort of the carrier. Texas & P.R. Co. vs. Mugg, 202 US 242, 50 L ed 1011, 26 Sup Ct Rep 628; Louisville & N. R. Co. vs. Maxwell, 237 US 94, 59 L ed 853, L.R.A. 1915E, 665, P.U.R. 1915C, 300, 35 S Ct Rep 494; Atchison T. & S. F. R. Co. vs. Robinson, 233 US 173, 58 L ed 901, 34 S Ct Rep 556; Dayton Coal & I. Co. vs. Cincinnati, N. O. & T.P.R. Co., 239 US 446, 60 L ed 375, 36 Sup Ct Rep 137; Erie R. Co. vs. Stone, 244 US 332, 61 L ed 1173, 37 Sup Ct Rep 633."

The law and procedure suggested by the Court of Appeals in this case would direct that such a question (is the applicable rate reasonable?) is to be referred to an administrative body — the Interstate Commerce Commission — which would have determined the reasonableness of the rate originally had the shipper used his administrative remedy, to-wit: protesting the rate when it was tendered for filing, or filing a complaint upon the rate. Thus, it is seen that under such law and procedure the inferior Courts may determine the issue of reasonableness, might even refer the proceedings under the holding of the Fifth Circuit in this case, or, more probably, would grant judgment for or against one of the parties, from whence in most jurisdictions there is no appeal.

In any event, such suggested procedure will prevent uniform justice. Most shipments and most controversies arising between carriers and shippers involve amounts so small that the very expense of litigation would prevent the parties from being heard by this sort of referral procedure.

This particular case is further complicated by the fact that hundreds of carriers in the Rocky Mountain Trans-continental Tariff (Rocky Mountain Motor Tariff Bureau,

Sec. 1, Pages 4-58, Rocky Mountain Transcontinental Territorial Directory No. 20-B, M.F. - I.C.C. No. 101) may be affected by a finding of unreasonableness brought about by the piecing of rates in tariffs to which they are not parties. Additional complications arise when it is realized that an almost unlimited selection of routes is available to the Government and the public from Marion, Oklahoma, to Planehaven, California. The Court may take judicial knowledge of the directed policy of the Military to equally divide its shipments among existing carriers. Such a policy directs the use of all combinations of carriers authorized to render the service. Consider the example provided by the present case: the Government suit is based upon a contention of unreasonableness because by piecing of a rate in Southwestern Motor Freight Bureau Tariffs to El Paso, and one from El Paso to Planehaven, California, in the Interstate Motor Freight Tariff, the only through applicable rate exceeds the aggregate of the sum total of said pieced rates over this route. But on the other hand, if the Government, in keeping with its directed policy, had utilized another authorized carrier, e.g. Transcon, direct or Riss & Company or Red Ball Motor Freight, Inc., from Marion, Oklahoma, to the Denver, Colorado, Gateway, and from that point any number of available carriers such as Illinois-California Express or Denver-Chicago Express, the aggregate of the intermediate rates would be higher than the through rate. An abstruse question is posed by all of this: upon what basis is it to be decided that a rate named in a single tariff for all carrier members by one route - the applicable rate - is to be unreasonable by piecing when there is the possibility that a rate by another route might be declared to be reasonable by the suggested referral procedure?

There is a final evil. Shall a carrier, under penalty of law, collect the applicable rate from one shipper, but return reparations to another as a result of a suit under the referral procedure?

It is impossible for the writer to know precisely the reasons Congress, by statute, granted administrative procedure for reparation in Rail Cases and withheld it in Motor Carrier Cases, Power Cases, Air Line, Gas Cases and others, but a reason suggests itself. Rail routes are relatively few in number, and by law must have joint rates. But there are so many different conditions, so many different routes and possibilities of service, and so many different rate schedules by different combinations of Motor Carriers (thousands) who may permissively institute joint rates,¹ that Congress in its wisdom, withheld reparation authority, probably on the ground of this vast complexity. The fact remains that it did withhold such authority.

It is urged that the law is, and of right ought to be that the applicable rate is the only rate. It is the legal rate until it is changed by the Interstate Commerce Commission, for all of the public, by authorized procedure.

It is further urged that the procedure should be that now provided for by Statute, viz: if a rate is thought to be unreasonable, it may be protested prior to going into existence, whereupon the administrative remedy and the function of the Commission may be properly exercised. If, through the sheer volume of business carried on daily before the Commission by Motor Carriers and because of the great size and extent of our nation, a carrier or shipper is prevented from discovering such a rate upon filing; the administrative procedure, open to interested parties, calls

¹See *East South Joint Rates and Routes, Cancellation 44*
MCC 747 (753).

for the filing of a complaint with the Commission, affording parties the right to be heard and receive an administrative decision provided for by the law, and affecting *all* the public — shippers and carriers alike.

The above is a just and orderly procedure, but the suggested procedure of referral ordered by the Court of Appeals here involved will bring chaos to the industry. Just as a practical matter, the referral procedure will render the enforcement of its applicable rates impossible. It is further suggested that the procedure outlined by the Court below in this specific case would allow the Commission to find that an applicable rate was unreasonable without any direction or any lawfully authorized procedure — without the participation of thousands of carriers to assist and advise the Commission on determining what amount per hundred is a reasonable rate. It would allow the shipper to pass his costs under the applicable rate to his customers without reimbursement, and it would allow the carrier to engage in commerce, set its service and cost in keeping with the applicable rate, and yet be deprived of the rate on file or approved by the Commission.

THE LAW:

It is undoubtedly the law, that in adjudicating the rights of a shipper and a carrier with respect to a rate, the applicable rate is the legal rate as between the carrier and the shipper. *Keogh vs. Chicago and N. W. Ry. Co.*, 260 US 151 (163), 67 L ed 183 (187); *Baltimore & Ohio Southwestern R. Co. vs. Settle*, 260 US 166, 67 Led 189; *T. & M. Transportation Co. vs. S. W. Shattock Chemical Co.*, 148 F 2d 777; *A.T. & S.F. R. Co. vs. Robinson*, 233 US 173 (180), 58 L ed 901 (905).

It is also the law that a Court may interpret the clear language of the tariff and apply the applicable rate. *Great Northern R. Co. vs. Merchants Elevator Co.*, 259 US 285,

67 L ed 943; *Railroad Commission vs. Great Northern R. Co.*, 281 US 412, 74 L ed 936; *Slocum vs. Delaware L. & W. R. Co.*, 339 US 239, 74 L ed 936.

Concomitantly, it is the law, by a long line of decisions in rail cases (where reparations are allowed in either Commission or in Courts), that where a highly technical question is at issue and is subsidiary, the Court may draw upon the aid of the Commission in using its particular field of knowledge for assistance. *Great Northern R. Co. vs. Merchants Elevator Co.*, 259 US 285, 66 L ed 943, 42 S Ct 477; *U.S. vs. Western Pacific R. Co.*, 352 US 59.

There is no Statutory law allowing reparations. Aside from the Davidson and T.I.M.E. cases, there is no Court case holding that the sole question of the unreasonableness of a rate may be referred to an administrative body which has no original jurisdiction to determine the issue. These two cases (Davidson and T.I.M.E.) are contrary to the plain holding of this Court in the Montana-Dakota case, *supra*. *McClellan vs. Montana-Dakota Utilities Co.*, 204 F 2d 166, Certiorari denied, 346 US 826; *T. & M. Transportation vs. S. W. Shattuck Chemical Co.*, 148 F2d 177; *Federal Power Commission et.al vs. Arkansas Power and Light Co.*, 330 US 802, 91 L ed 1261 (1262); *Myers vs. Bethlehem Shipbuilding Corp.*, 303 US 41, 82 L ed 638, 58 S Ct 459; *Aircraft Diesel Equipment Corporation, vs. Hirsch*, 331 US 752, 91 Led 1796.

These latter cases emphasize the long line of cases supporting *Myers vs. Bethlehem*, *supra*, holding that Courts do not have jurisdiction until administrative remedies have been exhausted. Failure to take advantage of these remedies by a random party does not change the law.

In the Texas & P.R. Co. vs. Abilene Cotton Oil Co., 204 US 426, 51 L ed 553, 27 S Ct 350, case, the Court said, on the question of the I.C.C. correcting rates:

"This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the Statute as to preferences and discriminations would inevitably follow." (440).

On redress by Courts, it was stated that such action "... Must be confined to redress of such wrongs as can consistently with the context of the act, be redressed by Courts without previous action by the Commission." (442)

And on Common Law action:

"This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with provisions of the Act. In other words, the Act cannot be held to destroy itself." (446)

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the Act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable . . ." (448)

In Robinson vs. Baltimore & O. R. Co., 222 US 506, 56 L ed 288, 32 S Ct 114:

"When the purpose of the Act and the means selected for the accomplishments of that purpose are understood, it is altogether plain that the Act contemplated that such an investigation and order by the designated

tribunal, the Interstate Commerce Commission, should be prerequisite to the right to seek reparation in the Courts because of exaction under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of the right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established and the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, with the derogation of the power expressly delegated to the Commission, and equally which the Act would design to secure." (509-510)

In support thereof, Arizona Grocery Co. vs. Atchison T. & S.F. R. Co., 284 US 370, 76 L ed 348, 52 S Ct 183, wherein the Supreme Court says:

"As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable rate; and if the Order, merely sets limits it is entitled to protection if it fixes a rate which falls within them. Whereas, as in this case, the Commission has made an Order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity ignore its own pronouncement promulgated, in its quasi-legislative capacity and retro-actively appeal its own enactment as to the reasonableness of the rate it has prescribed. (389)

The Commission in this particular case used its quasi-legislative powers when it promulgated Tariff Circular M.F.-3 (R. 11), saying that regardless of the intermediate rates, the through rate would apply. The filed tariff of the petitioner is within that Rule.

As set forth in the stipulations, there is only one tariff which names a rate between the point of origin and destination involved; and this Court has said in Baltimore and O.S.W.R. Co. vs. Settle, 290 US 166, 67 Ed 189, 43 S Ct 169:

"Through rates are, ordinarily, made lower than the sum of the intermediate rates. This practice is justified, in part, on the ground that operating costs of a through movement are less than the aggregate costs of the two independent movements covering the same route. But there may be traffic or commercial conditions which compel, or justify, giving exceptionally low rates to movements which are intermediate. The mere existence of such intermediate rates confers no right upon the shipper to use them in combination to defeat the applicable through rate. Here, there had been published interstate rates for the transportation from the southern points to Madisonville. For such transportation the interstate rates to Madisonville were the only lawful rates. To permit the applicable through interstate rate to be defeated by use of a combination of intermediate rates would open wide the door to unjust discrimination."

Judge Hutcheson says, in Western Grain Co. vs. St. Louis-San Francisco R. Co., 56 F 2d 160 (161):

"...it is also true that there must be an actual tariff in existence, and a shipper may not, by his own piecing, create one."

The utter confusion is demonstrated by the holding of the Commission itself. It must recognize under the Statutes that it does not have reparation authority. This it so holds forthrightly, (Davidson case 302 ICC 87) and also that it

does not have jurisdiction on a complaint for reparations. But after having said this, it reaches the strange conclusion that because a shipper institutes a suit which the Court cannot decide, the filing of the suit in some inexplicable manner gives the Interstate Commerce Commission by the mere filing of a suit the authority to grant reparations — The very authority the Statute withholds.

The Commission disposes of the Montana-Dakota power case by saying:

"However, we do not interpret the Montana-Dakota case as holding that where a cause of action to which *the issue of reasonableness is subsidiary* is maintainable in the Court in which it is brought, reasonableness issues may not be determined by the proper administrative body."

United States vs. Davidson Transfer & Storage Co., Inc., No. MC-1849, 302 I.C.C: 87.

Upon this Commission language the Court below also disposed of the Montana-Dakota decision.

WHEREFORE, premises considered, the Petitioner prays this Court that the judgment of the Fifth Circuit Court of Appeals be reversed and judgment of the District Court be, in all things, affirmed.

W. D. Benson, Jr.
Attorney for T.I.M.E. Incorporated,
Petitioner
P. O. Box 1120
Lubbock, Texas

APPENDIX

Opinion of District Court:

"THE APPLICABLE RATE

The through rate from Marion, Oklahoma, to Planehaven, California published in the Rocky Mountain Motor Tariff Bureau, Tariff 5-A, M.F.-I.C.C. No. 31, is the proper charge for the shipments in question, not only in conformity with the Interstate Commerce Commission, Tariff M.F. 3, Rule 4 (i), but also upon the authority of the only case coming to my notice, which seems directly in point, that is, T. & M. Transportation Co. vs. S. W. Shattuck Chemical Company, 148 Fed. 2d 777. The suggestion of counsel that the aforesaid Tariff M.F. 3, Rule 4 (i), is not applicable to the Government, in view of 31 U.S.C. 71, does not seem sound. There is no such explicit provision in the cited statute. The rule recognized in the decisions is that, in making contracts for the transportation of property by common carriers, the Government stands in the same attitude as any other shipper. Hughes Transportation, Inc. vs. United States, 121 F. Supp. 212.

"THE PLASTIC DOMES

The proper covering classification for this property is that describing 'Airplane Parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates', published in Rocky Mountain Motor Tariff Bureau, Tariff No. 5-A, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15, which is a subject covered in the filed stipulations.

"AIRCRAFT AILERONS

The proper covering classification for this property is that describing 'Wing panels or sections; in boxes or crates', published in National Motor Freight Classification No. 11, Item 2940, which is a subject covered in the filed stipulations. The Encyclopedia Britannica says that an aileron 'is a movable part of the wing of an aeroplane.'

"The brief of Government counsel has forecast that, presumably, said counsel will now request that judgment herein be held in abeyance while they file an action with the Interstate Commerce Commission to determine the reasonableness or unreasonableness of the through rate herein mentioned, and, ordinarily, in instances somewhat similar, that course has been approved. General American Tank Car Corp. vs. Eldorado Terminal Co., 308 U.S. 422; U. S. vs. Kansas City Southern Ry. Co., 217 Fed. 2d 763. But, in this instance, plaintiff's counsel seems to contend that, in respect to motor carriers, the Interstate Commerce Commission has no authority to decide the reasonableness or unreasonableness of a rate retrospectively as a basis for a reparation ordered by the Commission, or in support of a suit to recover an alleged overcharge by judicial judgment. This seems doubtful to me, just on the face of it, but I have not gone into the question closely, and if Government counsel do move to hold this case at rest, pending action before the Commission, then I would want to know whether such an order would serve any useful purpose, and, consequently, a thorough brief should be presented on the question above mentioned.

"Awaiting replies from respective counsel, I am,

Sincerely yours,

/s/ Jos. B. Dooley

United States District Judge"

"DEFENDANT'S MOTION TO HOLD JUDGMENT IN ABEYANCE:

"Filed: July 18, 1956

"Comes now, United States of America, defendant and cross plaintiff in the above numbered and entitled cause and respectfully moves the Court to hold in abeyance the entry of judgment herein for the length of time hereinafter set out, and for the following reasons.

1.

"This action was commenced by T.I.M.E. Incorporated, plaintiff, to recover from the United States of America, defendant, certain transportation charges on shipments originating at Marion, Oklahoma, and transported by plaintiff through El Paso, Texas, to Planehaven, California. In its answer defendant alleged that the aggregate of intermediate rates to and from El Paso is the applicable rate to said shipments rather than the through rate contained in Rocky Mountain Tariff Bureau as applied by T.I.M.E. Incorporated. The Court has determined this question adversely to the Government.

"In addition to its contention as to the applicable rate, defendant alleged that such through rate is *prima facie* unreasonable and, therefore, unlawful

to the extent that it exceeds the aggregate of the intermediate rates to and from El Paso. Since this Court does not have jurisdiction to determine the reasonableness or unreasonableness of the rate to be applied, the United States of America now desires to commence an action before the Interstate Commerce Commission for a determination of that question, which is within the exclusive jurisdiction of the Commission.

2.

"The United States of America has not filed an action before the Commission for such determination because of its contention that the only rate applicable to the forms in question is the aggregate of the intermediates, and no action before the Commission could be commenced until this Court had determined the applicable rate.

3.

"No hardship will fall on plaintiff by the Court's delay since even under the Court's adverse decision the Government will be entitled to a money judgment.

"WHEREFORE, the United States of America respectfully moves the Court to hold the entry of judgment in this case in abeyance for a period of sixty days from the granting of this motion, to afford her an opportunity to apply to the Interstate Commerce Commission for a determination of the reasonableness or unreasonableness of the rate which the Court

deems applicable to the shipments involved herein and if such proceeding is commenced within such sixty day period then to continue to hold the judgment in abeyance until the Commission has finally determined the reasonableness or unreasonableness of the applicable rate.

Respectfully submitted,

Heard L. Floore
United States Attorney

/s/ John A. Lowther,
John A. Lowther, Assistant
United States Attorney"

"OPINION OF DISTRICT COURT ON MOTION TO HOLD IN ABEYANCE:

"The defendant's motion to hold the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission is overruled and such an order should be presented promptly.

"This ruling results from the conclusion that Montana-Dakota Utilities Co. vs. Northwestern Public Service Co., 341 U. S. 246, and McClellan vs. Montana-Dakota Utilities Co., 104 F. Supp. 46, affirmed 204 F. 2d 166, certiorari denied 346 U. S. 826, are decisive against said motion.

"Ordinarily the Interstate Commerce Commission, like the United States Maritime Commission (Shipping Act, U. S. Code, Title 46, Paragraph 817 and 821), in con-

nection with reparation authority, may review the reasonableness of rates charged in past shipments. This is true in respect to railroads, (Interstate Commerce Act, U. S. Code, Title 49, Para. 13 (1)), and with respect to water carriers, (Interstate Commerce Act, U. S. Code, Title 49, Para. 907 (b) and 908 (b), (c), (d)), but that jurisdiction is lacking in respect to motor carriers (Interstate Commerce Act, U. S. Code, Title 49 Para. 316 (e)). The Civil Aeronautics Board, as the administrative agency over the air carriers, has no reparation authority nor jurisdiction to review rates as to past transportation, (Civil Aeronautics Act, U. S. Code, Title 49, Para. 642 (d)). The same limitation of authority is found in the Natural Gas Act, U. S. Code, Title 15, Para. 717d (a), and in the Federal Power Act, U. S. Code, Title 16, Para. 824e (a). The legislative policy for these differences may not be evident, but there can be no doubt that the distinction is clearly manifested.

"The Montana-Dakota Utilities Co. vs. Northwestern Public Service Co. case arose under the Federal Power Act and it will be noticed that the crucial statutory article cited in that decision in the presently material part is virtually word for word the same as the parallel statutory article dealing with motor carriers. In other words, I am unable to see any substantial difference in principle between that case and the present suit. Moreover, the denial of the present motion is also supported in Slick Airways vs. American Airlines, 107 F. Supp. 199, 212, where the court said 'if the instant complaint merely sought to recover

damages under the Civil Aeronautics Act on account of unfair competitive practices committed, or unreasonable rates charged, by defendants, I would agree that it would not state a cause of action in this court.'

"It is true that the action on the present motion is contrary to the decision in Bell Potato Chip Co. vs. Aberdeen Truck Lines, 43 M.C.C. 337, which was decided before the Montana-Dakota case, and, likewise, contrary to the decision in New York-New Brunswick Auto Express Co. Inc. vs. The United States, 126 F. Supp. 215, cited by Government counsel, as well as the strongest case for the Government, United States vs. Garner, 134 F. Supp. 16, but the Montana-Dakota case was not mentioned in either of the two opinions and probably did not come to the notice of the Court.

Sincerely yours,

/s/. Jos. B. Dooley

United States District Judge"

"JUDGMENT OF DISTRICT COURT:

"On this day came on to be considered the above styled cause; the Court having tried the case in June of 1956 and having considered the evidence, the stipulation and contentions of the respective parties, and the defendant having filed its motion to hold the entry of judgment in abeyance pending the instituting

of proceedings before the Interstate Commerce Commission, and it appearing that such motion should be overruled, the Court finds:

"That the through rate from Marion, Oklahoma to Planehaven, California published in Rocky Mountain Motor Tariff Bureau, Tariff 5-A, M.F.-I.C.C. No. 31, is the only proper charge for the shipments in question, in conformity with the Interstate Commerce Commission Tariff Circular M.F. No. 3, Rule 4(i), and that Rule 4(i) is applicable to the Government.

"The Court further finds that the proper covering classification for a shipment of 'Domes, Airplane, Cellulose, Derivatives, Plastic and Metal Combined' is 'Airplane parts, NOI, made of plastics, synthetic gums or resins, in boxes or crates', as published in Rocky Mountain Motor Tariff Bureau 5A, M.F.-I.C.C. No. 31, Item 120, combined with Rule 15.

"The Court further finds that the proper covering classification on a shipment billed as '8 boxes aircraft ailerons' is covered in the tariff described as 'wing panels or sections; in boxes or crates', as published in National Motor Freight Classification No. 11, Item 2940.

"The Court is of the opinion that the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission should be overruled and that jurisdiction is lacking in the Interstate Commerce Commission in respect to Motor Carriers to review the reeasonableness of rates charged on past shipments.

"It is, therefore, ORDERED, ADJUDGED AND
DECREEED BY THE COURT AS FOLLOWS:

- (a) That the motion of the defendant to hold the entry of the judgment in abeyance pending proceedings to be instituted before the Interstate Commerce Commission is overruled.
- (b) That the defendant, United States of America, owes plaintiff, T.I.M.E. Incorporated the sum of \$14,414.82, and that plaintiff, T.I.M.E. Incorporated is indebted to the defendant, United States of America, in the sum of \$16,942.03, and accordingly the defendant, United States of America, on its cross action against T.I.M.E. Incorporated is awarded judgment against plaintiff, T.I.M.E. Incorporated for the sum of \$2,527.21.
- (c) That each party hereto pay the costs incurred by it.
- (d) That all other relief herein prayed for is hereby specifically denied.

Entered this the 5th day of March, 1957.

/s/ Jos. B. Dooley

United States District Judge"

In the
**United States Court of Appeals
FOR THE FIFTH CIRCUIT**

No. 16738

UNITED STATES OF AMERICA,

Appellant,

versus

T.I.M.E., INCORPORATED,

Appellee

*Appeal from the United States District Court for the
Northern District of Texas.*

(January 30, 1958.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges. T.I.M.E., Incorporated, a motor carrier, sued the United States under the Tucker Act¹ for unpaid transportation charges on shipments of freight. The United States asserted counterclaims upon which the district court held that it was entitled to \$16,942.03, and that holding is not contested on appeal.

¹ 28 U.S.C.A. Sec. 1346 (a)(2).

This appeal involves solely the question of the correctness of the district court's determination that T.I.M.E. was entitled to a total of \$14,414.82 on its claims.

The facts were stipulated. T.I.M.E. was a common carrier motor carrier operating generally between Oklahoma City, Oklahoma and Los Angeles, California via El Paso, Texas, under authority of the Interstate Commerce Commission. It transported some twenty shipments of scientific instruments under Government bills of lading. A typical shipment illustrates the issues with respect to all of the shipments: it originated at Tinker Air Force Base, Marion, Oklahoma, and was transported over the lines of T.I.M.E. and a connecting carrier to McClellan Air Force Base at Planehaven, California.

At the time, there were on file with the Interstate Commerce Commission the following tariffs to which T.I.M.E. was subject:

- (1) Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M.F.-ICC No. 31, providing a double first-class through rate of \$10.74 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to Planehaven, California.
- (2) Southwestern Motor Freight Bureau Tariff No. 1-F, M.F.-ICC No. 141, providing a rate of \$2.56 per cwt. on scientific instruments N.O.I. from Marion, Oklahoma to El Paso, Texas.
- (3) Interstate Freight Carriers Conference Tariff No. 1-C, N.F.-ICC No. A-5, providing a rate of \$4.35 per cwt. on scientific instruments N.O.I. from El Paso, Texas to Planehaven, California.

The through rate, \$10.74, was thus considerably in excess of the sum of the intermediate rates, \$6.91. There was, however, on file with the Commission the official issue of the Interstate Commerce Commission Tariff M.F.-3, Rule 4(i), which reads:

"(i) When a carrier or carriers establish a local or joint rate for application over any route from point of origin to destination, such rate is the applicable rate of such carrier or carriers over the authorized route, notwithstanding that it may be higher than the aggregate of the intermediate rates over such route."

The Government had paid the intermediate rates. The district court held that T.I.M.E. was entitled on its claims to a total of \$14,414.82, the difference between the through rate and the aggregate of the intermediate rates.² The Government made some contention at the trial that the combination of the intermediate rates is applicable, but that position is not urged on appeal. The Government's main defense, which it continues to urge in this Court, is that the through rate is *prima facie* unreasonable and unlawful to the extent that it exceeds the aggregate of the intermediate rates, and that the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness or unreasonableness of the rate to be applied.

² Because of the larger amount of the Government's counterclaims, \$16,942.08, not now in issue, judgment was entered in favor of the United States in the amount of \$2,537.21.

Under Tariff M.F.-3, Rule 4(i), quoted *supra*, the fact that the through rate is higher than the aggregate of the intermediate rates does not prevent it from being the applicable rate of the carrier. The Commission has often ruled, however, that through rates are *prima facie* unjust and unreasonable to the extent that they exceed the combination of local rates from and to the same points.³

Section 216 (c) of the Interstate Commerce Act, 49 U.S.C.A. 316(c), provides that: "Common carriers of property by motor vehicles may establish reasonable through routes and joint rates, charges, and classifications" with other carriers. Section 216 (d), 49 U.S.C.A. 316(d), provides that: all charges of motor carriers for services covered by the Act "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful." Section 204(c), 49 U.S.C.A. 304 (c), provides that: upon complaint or upon its own initiative the Commission may investigate whether any motor carrier has failed to comply with any provision of the chapter or with any requirement established pursuant thereto, and issue an appropriate order to compel compliance.

Section 13, et seq., of the Act, 49 U.S.C.A. 13, et seq., dealing with railroads, gives the Commission authority to award reparations, subject to a two-year limitation period, Section 16 (3), 49 U.S.C.A. 16(3); but part II

³. See Kingan & Co. v. Olson Transportation Co., 32 M.C.C. 10; Stokely Foods, Inc. v. Foster Freight Line, Inc., 62 M.C.C. 179; United States v. Davidson Transfer & Storage Co., Inc., No. MC-C-1849, decided October 14, 1957.

of the Act covering motor carriers contains no similar provision. Nevertheless, the Commission has consistently held that the general powers conferred upon it in the sections already mentioned and in other sections furnish authority to determine the reasonableness of a past rate, the lawfulness of which is brought into issue in a judicial proceeding.

Holdings to that effect had been made in a long line of decisions by divisions of the Commission.⁴ In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, the full Commission undertook a "thorough re-examination" of its authority to "make an administrative determination of the lawfulness of rates charged on past shipments," and concluded that the earlier decisions of its divisions were correct. The opinion in the *Bell Potato Chip Co.* case, *supra*, was reconsidered at length and approved by the Commission in the very recent case of *United States v. Davidson Transfer & Storage Co., Inc.*, No. M-C-1849, decided October 14, 1957.

This construction of the Act by the body charged with primary responsibility for its administration is, of course, entitled to great weight by the courts.⁵ Following such

⁴ See *W. A. Barrows Porcelain Enamel Co. v. Cushman M. Delivery*, 11 M.C.C. 365, 367; *Hausman Steel Co. v. Seaboard Freight Lines, Inc.*, 32 M.C.C. 31; *Dixie Mercerizing Co. v. ET and WNC Motor Transp. Co.*, 21 M.C.C. 491, affirmed on reconsideration, 41 M.C.C. 355; *Koppers Co. v. Langer Transport Corp.*, 12 M.C.C. 741; *Hill-Clarke Machinery Co. v. Webber Cartage Lines, Inc.*, 26 M.C.C. 144; *Patten Blinn Lbr. Co. v. Southern Ariona Freight Lines*, 31 M.C.C. 716.

⁵ See *United States v. Bergh*, 1956, 352 U.S. 40, 47; *Adams v. United States*, 1943, 319 U.S. 312, 314-315; *United States v. Citizens Loan & Trust Co.*, 1942, 316 U.S. 209, 214; *Inland Waterways Corp. v. Young*, 1940, 309 U.S. 517; *United States*

construction, the Court of Claims and another district court have looked to the Commission for aid in the disposition of suits involving past motor carrier rates alleged to be unreasonable.⁶

The district court in the present case thought that the case of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, precluded it from holding the entry of judgment in abeyance pending proceedings before the Interstate Commerce Commission. That was a five-to-four decision in which the majority held that the complaint stated no federally cognizable cause of action to which the referred issue was subsidiary. After full discussion, that case was distinguished in the report of the Commission in *United States v. Davidson Transfer & Storage Co.*, *supra*, with the conclusion that:

• • • • However, we do not interpret the *Montana-Dakota* case as holding that where a cause of action to which the issue of reasonableness is subsidiary is maintainable in the court in which it is brought, reasonableness issue may not be determined by the proper administrative body.

In *United States v. Western Pacific R. Co.*, 1956, 352 U.S. 59, 72, it was argued that, because Section 16 (3)

v. American Trucking Associations, Inc., 1940, 310 U.S. 534, 549; *United States v. Madigan*, 1937, 300 U.S. 500, 506; *Norwegian Nitrogen Co. v. United States*, 1933, 288 U.S. 294, 315; *United States v. Jackson*, 1930, 280 U.S. 183, 193; *Edwards's Lessee v. Darby*, 1827, 12 Wheat. (25 U.S.) 207, 210.

⁶ *New York & New Brunswick Auto Express Co. v. United States*, Ct. of Cl. 1954, 126 F. Supp. 215; *United States v. Garner*, E.D.N.C. 1955, 134 F.Supp. 16.

of the Act prevented the Commission from considering complaints for overcharges against railroad carriers not filed within two years from the time the cause of action accrued, that the Commission was barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions came to the Commission by way of referral or an original suit. The Supreme Court held:

“ . . . that the limitation of Sec. 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commissions' primary jurisdiction, as were these questions relating to the applicable tariff.”

United States v. Western Pacific R. Co., supra at p. 74

The case of *United States v. Chesapeake & Ohio R. Co.*, 1956, 352 U.S. 77, 81, decided on the same day, is to the same effect. From those decisions, it would seem to follow that the Commission's lack of power to award reparations does not negative its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable cause of action pending in court.

Congress undertook, in terms, to save existing common law and statutory rights and remedies. Section 216 of the Act, 49 U.S.C.A. 316, relating to the duty to establish reasonable rates, concludes with a provision that: “Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent here-

with." Very clearly, the district court could not itself undertake an independent investigation into the reasonableness of the rate. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. The court, then, had the alternative either of denying the shipper any remedy against a filed rate, which on its face was *prima facie* unreasonable and unlawful, or of holding its judgment in abeyance to permit a determination of the reasonableness of the rate by the Interstate Commerce Commission. In our opinion, the second alternative is more consistent with justice, with the terms of the Interstate Commerce Act, and with the cases. The judgment of the district court is, therefore, reversed and the cause remanded with directions to grant the motion to hold the judgment in abeyance to enable the Government to obtain a determination from the Interstate Commerce Commission with respect to the reasonableness of the through rate as applied to the transportation services here involved.

REVERSED AND REMANDED WITH DIRECTIONS.

Part I, I.C.C. Act (Rail Carriers):

The relevant portion of Section 15 of Part I of the Interstate Commerce Act, as amended February 28, 1920, c. 91, 41 Stat. 486, 49 U.S.C.A. Sec. 15 (7) provides:

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers, affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made,

within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.***"

The relevant portion of Section 16 of Part I of the Interstate Commerce Act, as amended June 7, 1924, c. 325, 43 Stat. 633, September 18, 1940, c. 722, 54 Stat. 913, 49 U.S.C. 16 (3)(b) provides:

(3)(b) "All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) "For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the

two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(g) "The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission."

POWER ACT:

The relevant portion Sec. 205a et seq. of the Act. 49 Stat. 851, ch. 687, 16 USC, Sec. 824d (a) etseq (16 USCA 824d (a) - (c) P. 624):

"824d. Rates and charges; schedules; suspension of new rates.

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the law-

fulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions

preference over other questions pending before it and decide the same as speedily as possible. June 10, 1920, c. 285, Para. 205, added August 26, 1935, c. 687, Title II, Para. 213, 49 Stat. 851."

Sec. 206 (a), 49 Stat. 852, ch. 687, 16 USC 824e (a)-(b), (16 USCA 824e P. 625).

"824e. Power of Commission to fix rates and charges; determination of cost of production or transmission,

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, reasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State Commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. June 10, 1920, c. 285, Para. 206, added Aug. 26, 1935, c. 687, Title II, Para. 213, 49 Stat. 852."

CERTIFICATE OF SERVICE

I, W. D. Benson, Jr., Counsel for Petitioner, T.I.M.E. Incorporated, do hereby certify that I have served five (5) copies of Petitioner's Brief upon the Solicitor General, Honorable J. Lee Rankin, and a copy upon each attorney of record for Respondent by depositing the same in the United States mail with the postage prepaid, properly addressed.

TO CERTIFY WHICH, witness my hand this the

day of

1958.

W. D. Benson, Jr.
Attorney for Petitioner,
T.I.M.E. Incorporated

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 68

T. I. M. E., INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT AND THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No. 68.—The opinion of the United States District Court for the Northern District of Texas (T. R. 23-25)¹ is unreported. The opinion of the Court of

¹ Record references in No. 68 (*T. I. M. E., Inc.*) are designated "T. R. —", and in No. 96 (*Davidson*) are designated

Appeals for the Fifth Circuit (T. R. 29-35) is reported at 252 F. 2d 178.

No. 96.—The order of the United States District Court for the District of Columbia granting summary judgment (D. R. 8) was entered without opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (D. R. 9-17) is reported at 259 F. 2d 802.

JURISDICTION

No. 68.—The judgment of the Court of Appeals for the Fifth Circuit was entered on January 30, 1958. A timely petition for rehearing was denied on February 25, 1958. The petition for a writ of certiorari was filed on May 26, 1958, and was granted on October 13, 1958 (T. R. 37).

No. 96.—The judgment of the Court of Appeals was entered on April 24, 1958. The petition for a writ of certiorari was filed on June 11, 1958 and was granted on October 13, 1958 (D. R. 18).

The cases were consolidated by this Court's order granting certiorari (T. R. 37; D. R. 18). In both cases, the jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in a suit by a motor carrier to recover charges allegedly due, which is defended by the shipper on the ground that those charges are unreason-

"D. R. —". References to the briefs of petitioners T. I. M. E. and Davidson will be designated "T. Br. —" and "D. Br. —", respectively.

able, the court must stay its hand and refer the "reasonableness" question to the Interstate Commerce Commission.

2. Whether, following the post-payment audit of transportation bills, the Comptroller General may recoup overpayments resulting from unreasonable charges by following the procedures set forth in Section 322 of the Transportation Act of 1940.*

STATUTES INVOLVED

Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. 66 prior to its amendment, and as amended by P. L. 85-762 (Act of August 26, 1958), and relevant portions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*, are set forth in the Appendix, *infra*, pp. 45-50.

STATEMENT

Petitioners, motor carriers in interstate commerce, filed these two suits against the United States under the Tucker Act, 28 U. S. C. 1346 (a) (2), to recover additional sums allegedly due the carriers for transporting Government property. In both cases, the United States defended on the principal ground that the additional charges demanded were unreasonable. In both cases, the courts below directed the district courts to refer the question of reasonableness to the Interstate Commerce Commission for determination. The facts in the two cases are as follows:

No. 68.—T. I. M. E., Inc., a motor carrier operating between Oklahoma City, Oklahoma and Los Angeles,

* This question is presented in No. 96 only.

California, via El Paso, Texas, transported several shipments of scientific instruments N. O. I. (not otherwise indexed) under Government bills of lading (T. R. 18). One of these shipments, which the parties agreed was illustrative and did not differ in material respects from the other shipments, originated at Tinker Air Force Base, Marion, Oklahoma (T. R. 9-10). It was transported over the lines of petitioner and a connecting carrier from that point to McClellan Air Force Base at Planehaven, California (T. R. 10).

At the time of this movement, there were on file with the Interstate Commerce Commission these unapproved tariffs to which petitioner was subject (T. R. 10):

(1) *Through Rate from Marion, Oklahoma to Planehaven, California.*—Rocky Mountain Motor Tariff Bureau Tariff No. 5-A, M. F.-ICC No. 31, providing a double first class through rate of \$10.74 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma, to Planehaven, California.

(2) *Intermediate Rate from Marion, Oklahoma to El Paso, Texas.*—Southwestern Motor Freight Bureau Tariff No. 1-F, M. F.-ICC No. 141, providing a rate of \$2.56 per cwt. on scientific instruments N. O. I. from Marion, Oklahoma, to El Paso, Texas.

(3) *Intermediate Rate from El Paso, Texas to Planehaven, California.*—Interstate Freight Carriers Conference Tariff No. 1-C, M. F.-ICC No. A-5, providing a rate of \$4.35 per cwt. on scientific instruments N. O. I. from El Paso, Texas, to Planehaven, California.

After post-payment audit by the General Accounting Office under Section 322 of the Transportation Act

of 1940, 49 U. S. C. 66, *infra*, p. 45, the Government concluded that petitioner was entitled only to sums equal to charges computed on the basis of a combination of the intermediate rates from Marion, Oklahoma, to El Paso, Texas (\$2.56), and from El Paso to Planehaven, California (\$4.35), *i. e.*, \$6.91 per cwt. T. I. M. E. claimed, however, that the considerably higher through rate of \$10.74 per cwt. was properly applicable as a matter of tariff construction.

T. I. M. E. filed this action in the United States District Court for the Northern District of Texas to collect the balance allegedly due it (T. R. 1-4). In answer, the Government contended that the applicable rate was a combination of the intermediate rates. It further urged that, if the court should determine the higher through rate to be applicable, the proceedings should be stayed to enable the Government to obtain a determination from the Interstate Commerce Commission as to the reasonableness of that rate as applied (T. R. 11-12).

The case was submitted upon a stipulation which set forth the facts outlined above (T. R. 9-14). On

³ T. I. M. E. claimed that the correct charges for the twenty shipments of scientific instruments totalled \$20,151.88 (T. R. 16). The net payment by the Government after post-audit was \$5,737.06, leaving a balance on T. I. M. E.'s claims of \$14,414.82 (T. R. 3, 16). T. I. M. E. admitted that it owed the United States \$16,277.89 on certain overcharges on other shipments, but claimed that the United States had wrongfully deducted from bills otherwise lawfully due an additional amount of \$2,242.58 (T. R. 4). Thus, the total claim by T. I. M. E. in the district court was \$16,657.40 less the admitted overcharges to the United States of \$16,277.89, leaving a balance of \$379.51 (T. R. 4).

June 30, 1956, the district court ruled that the through rate was applicable to the shipment of scientific instruments (T. R. 19-21). On July 18, 1956, the Government moved to hold the entry of judgment in abeyance to enable it to apply within sixty days to the Interstate Commerce Commission for a determination of the reasonableness of the through rate as so applied (T. R. 21-23). On December 29, 1956, the court denied this motion on the ground that the Commission does not have jurisdiction to review the reasonableness of rates charged on past shipments by motor carriers (T. R. 23-25). On March 5, 1957, judgment was entered for petitioner on its claims in the amount of \$14,414.82 (*i.e.*, the difference between the through rate and the aggregate of the intermediate rates) (T. R. 25-26).*

The Government appealed to the Court of Appeals for the Fifth Circuit, urging that the district court had erred in refusing to refer the issue of the reasonableness of the through rate to the Interstate Commerce Commission (T. R. 27). The Court of Appeals reversed and remanded with directions to grant the Government's motion to hold judgment in abeyance in order to give the Government an opportunity to obtain a determination from the Interstate Commerce Commission as to the reasonableness of the through rate as applied (T. R. 35). The court held, citing *United States v. Western Pacific R. Co.*, 352 U. S.

* Because a larger judgment was entered on the Government's counterclaims (\$16,942.03), the United States obtained a net recovery (T. R. 26).

59, 72, and *United States v. Chesapeake & Ohio R. Co.*, 352 U. S. 77, 81, that the Commission's lack of power to award reparations to shippers by motor carrier does not detract from its authority to determine the reasonableness of a filed rate, when that issue is incident to a federally cognizable cause of action pending in a district court (T. R. 29-35).

No. 96. On or about May 29, 1952, Davidson Transfer and Storage, Inc., transported four shipments on Government bills of lading from Poughkeepsie, New York, to Bellbluff, Virginia (D. R. 2-3). Thereafter, it billed the Government for this transportation on the basis of unapproved tariff rates which it then had on file with the Interstate Commerce Commission. These rates included a surcharge which was added to the regular rates assessed on all shipments carried to, from, through, or between points in the State of New York (D. R. 3). The ostensible purpose of the surcharge was to recoup the cost to motor carriers of a ton-mile truck tax levied by New York for the privilege of operating motor vehicles on its highways.

As required by Section 322 of the Transportation Act of 1940, *infra*, p. 45, petitioner's bills were paid by the Government as rendered, without first being audited by the General Accounting Office (D. R. 3). Upon the post-payment audit contemplated by Section 322, however, the General Accounting Office disallowed that portion of the payments which represented the surcharge. The basis of this disallowance was that on July 20, 1953, following an investigation which had been initiated in 1951, the Interstate

Commerce Commission had determined the surcharge to be unjust and unreasonable, and had ordered petitioner and other motor carriers to cancel that portion of their filed rates which reflected it. *Surcharges, New York State*, 62 M. C. C. 117 (D. R. 3).

Under protest, petitioner refunded the disallowed portion of the payments (totaling \$18.34) (D. R. 4-4). It then instituted this suit against the United States in the United States District Court for the District of Columbia to recover the refund (D. R. 4-5). A number of other carriers with similar claims against the Government were permitted to intervene. Both petitioner and the Government filed motions for summary judgment (D. R. 7-8). The district court, without opinion, granted petitioner's motion and denied that of the Government (D. R. 8).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed, holding that the United States could defend against petitioner's claim on the ground that the surcharge was unreasonable (D. R. 9-17). It pointed to the common law right of a shipper by motor carrier to be free from the exaction of an unreasonable rate, and held that the common law remedy for enforcement of this right was expressly preserved by the savings clause in Section 216 (j) of the Interstate Commerce Act (49 U. S. C.

* Petitioner's tariff, including the New York surcharge, was filed on October 8, 1951: its operation was suspended for the maximum period allowed by statute pending inquiry by the Commission, but it went into effect on May 8, 1952, before the Commission's investigation was completed (62 M. C. C. 17).

316 (j)). Concluding that it was not clear from the *Surcharges, New York State* case, *supra*, whether the Commission regarded the surcharge as having been unreasonable when the shipments here involved were made, the Court of Appeals remanded to the district court with instructions to refer that question to the Commission as a matter within its primary jurisdiction (D. R. 17).

SUMMARY OF ARGUMENT

I

In these suits for transportation charges filed by the petitioner motor carriers against the United States under the Tucker Act, the courts below have ruled that the United States may defend on the ground that the charges are unjust and unreasonable. Applying the primary jurisdiction doctrine, both appellate courts have ordered the district courts to refer the question of unreasonableness to the Interstate Commerce Commission.

Petitioners argue, however, that, despite the express prohibition against unreasonable charges in the Motor Carriers Act, they may retain all unreasonable charges already exacted; that the Interstate Commerce Commission has no authority to investigate or to make findings as to such charges on past shipments; and that the courts cannot refer the economic issue of unreasonableness to the Commission, even though it is raised as a claim or defense in an action in which the court has jurisdiction of the parties and the subject matter.

Petitioners' contentions are grounded principally on the fact that the Motor Carriers Act does not confer authority on the Commission to award reparations. In our view, absence of reparations authority the Commission does not operate to permit motor carriers to collect or retain unreasonable charges—charges which are unlawful both at common law and under the Motor Carriers Act.

A. The United States, as a shipper, has a judicially enforceable right against the exaction by motor carriers of unreasonable charges. The Motor Carriers Act itself enjoins motor carriers to charge reasonable rates. Section 216 (b), (d), 49 U. S. C. 316 (b), (d), affirms, for purposes of federal regulation, the ancient duty of a common carrier to charge just and reasonable rates to all shippers. Thus, although the Motor Carriers Act, like the Interstate Commerce Act, Part I, made the tariff rates filed by a carrier the legal rates, these rates are *lawful* only when they meet the criterion of reasonableness adopted from the common law. Breach of a statutory duty normally implies the existence of a judicial remedy. *Texas and New Orleans R. Co. v. Railway Clerks*, 281 U. S. 548. The absence of affirmative power in the Commission to award reparations is certainly no bar to a district court remedy. *United States v. Western Pacific R.*, 352 U. S. 59.

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246, is plainly distinguishable. This Court found that Congress, when it enacted the Federal Power Act, "deliberately" confined

the Power Commission to regulation of future rates. 341 U. S. at 258.

B. If the Interstate Commerce Act does not create its own remedy against motor carriers who charge unreasonable rates, then the remedy which existed at common law survived by operation of Section 216 (j) of the Motor Carriers Act (49 U. S. C. 316 (j)). While the courts cannot, as at common law, determine the issue of reasonableness, they can apply the common law remedy to the economic facts which have been found by the Commission. Uniformity of regulation is achieved by reference of the economic issue of reasonableness to the expert agency.

C. The Commission has authority to make findings as to the lawfulness of motor carriers rates charged on past shipments. This power does not depend upon authority to award reparations; it derives from the Commission's general powers to investigate any failure by a motor carrier to comply with the provisions of the Act (Sec. 204 (c), 49 U. S. C. 304 (c)) and from the express provisions requiring motor carriers to charge just and reasonable rates (Sec. 216 (b), (d), 49 U. S. C. 316 (b), (d)). The Commission has consistently adhered to this view in adjudicating disputes between shippers and motor carriers for more than fourteen years (*Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M. C. C. 337; *United States v. Davidson Transfer & Storage Co., Inc.*, 302 I. C. C. 87), and Congress has been so advised on repeated occasions.

Since a judicial remedy against a carrier charging unreasonable rates is available to shippers, and since the Interstate Commerce Commission may make findings as to the reasonableness of past rates, the question of reasonableness, as an issue of economic fact relevant to the cause of action, may be referred to the Commission for resolution. *United States v. Western Pacific R. Co.*, 352 U. S. 59. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, *supra*, is once again distinguishable. In *Montana-Dakota*, this Court declined to order a suit held in abeyance pending a determination of the reasonableness of electric power rates by the Power Commission. But it did so because there was no federally cognizable cause of action before the court. In the instant cases, the district courts had jurisdiction of the parties and the subject matter, a jurisdiction which petitioners themselves invoked. As an incident to the exercise of this jurisdiction, the issue of reasonableness may be referred to the Commission for the practical purpose of obtaining an expert appraisal of the economic facts upon which the judicial remedy depends. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481. Thus, these suits have been ordered held in the district court, pending resolution of the economic question, because they are cases in which the court alone has power to grant the relief sought. Cf. *Far East Conference v. United States*, 342 U. S. 570, 576-577.

II

Section 322 of the Transportation Act of 1940 authorized the General Accounting Office to deduct

from bills subsequently rendered all "overpayments" made to common carriers. Davidson argues that "overpayments" should be equated with "overcharges"—which is elsewhere defined, for other and distinct purposes, as meaning charges in excess of the filed tariff rate.

But there is no reason to accord to the term "overpayments" the more restrictive meaning sometimes associated with "overcharges". Congress, when it enacted Section 322, proposed to reserve fully the Government's right to make itself whole by withholding.

United States v. New York, N. H. & H. R. Co., 355 U. S. 253. And more recent amendment of Section 322 (in 1958) confirms Congressional awareness of the difference between the two terms.

ARGUMENT

In the decisions challenged here by petitioners, the Court of Appeals for the Fifth Circuit (in *T. I. M. E.*) and the Court of Appeals for the District of Columbia Circuit (in *Davidson*) held that the United States has the right to resist a suit for freight charges by common carriers by motor vehicle, on the ground that the charges demanded are unreasonable. Both courts further recognized, in accordance with the primary jurisdiction doctrine enunciated in *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, and recently restated in *United States v. Western Pacific R. Co.*, 352 U. S. 59, that the defense of unreasonableness cannot be sustained on the merits unless the Interstate Commerce Commission, the agency charged by Congress with exclusive supervision of rates for

interstate motor carriage, first finds that the charges in question were unreasonable. Accordingly, both courts have ordered the suits held in abeyance until the Commission has passed upon the issue of reasonableness.

Petitioners deny the power of the courts to allow the defense of unreasonableness; deny that the Interstate Commerce Commission has any authority to make findings as to past charges; and deny that the courts may hold the case in abeyance while the issue of reasonableness is referred to the Commission. These contentions are based almost exclusively on the fact that the Motor Carriers Act of 1935, 49 Stat. 543, as amended, does not specifically authorize the Interstate Commerce Commission to grant reparations to shippers who are injured by violations of the Act.

But the absence of such an explicitly formulated sanction does not, we submit, justify exaction by the carrier of excessive and unreasonable charges. As we point out below, the Act itself, in mandatory terms, states the affirmative duty of interstate common carriers by motor vehicle to charge just and reasonable

* In both cases, a showing was made that the defense of unreasonableness of the rates was substantial. In *T. I. M. E.*, the Government's defense was supported by I. C. C. decisions holding that through motor carrier rates which exceed the aggregate of intermediate rates are *prima facie* unlawful, *e. g. Stokely Foods, Inc. v. Foster Freight Lines, Inc.*, 62 M. C. C. 179; *Kingan and Co. v. Olson Transportation Co.*, 32 M. C. C. 10. In *Davidson*, it was supported by the I. C. C.'s decision that inclusion of the New York surcharge in rates for shipments through that state was unreasonable. *Surcharges, New York State*, 62 M. C. C. 117.

rates.' Since this declaration of carrier obligation confirmed the established common law rule, there is certainly no reason to imply that it destroyed the remedies for illegal exactions. The Commission has long acted on the assumption that those remedies exist, and it has regularly exercised the power to make findings as to the reasonableness of past rates in aid of judicial proceedings.

I

THE UNITED STATES AS A SHIPPER HAS A JUDICIALLY ENFORCEABLE RIGHT AGAINST THE EXACTION BY MOTOR CARRIERS OF UNREASONABLE CHARGES

A. THE INTERSTATE COMMERCE ACT IMPOSES A JUDICIALLY ENFORCEABLE DUTY ON MOTOR CARRIERS TO CHARGE REASONABLE RATES

1. *The Common Law Background of the Interstate Commerce Act.*—When it undertook the regulation of interstate motor carriage, Congress was unequivocal in its command that the charges of carriers should be just and reasonable. In Section 216 (b) [49 U. S. C. 316 (b)] the Motor Carrier Act provided:

It shall be the duty of every common carrier of property by motor vehicle * * * to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto * * *.

We note that in the *Davidson* case the rates involved were challenged at filing, were suspended by the Commission, and ultimately were held to be unreasonable. *Davidson* is thus seeking to retain unreasonable charges it succeeded in collecting between expiration of the suspension and the Commission's final order.

This duty was reenforced by the express declaration in Section 216 (d) [49 U. S. C. 316 (d)] that:

All charges made for any service rendered or to be rendered by any motor carrier by motor vehicle engaged in interstate or foreign commerce * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *

The duty imposed by the language quoted above was not a new obligation. It was a codification, for purposes of federal regulation, of a rule known to the common law from the earliest days. 2 Hutchinson, *Law of Carriers* § 805 (3d ed. 1906); 2 Kent's *Commentaries* *599-600, n. (a) (14th ed.). See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 262. At common law it was a tort for a common carrier to demand an unreasonable charge for its customary services. *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, 660; *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436. Beyond this, the common law's requirements were not extensive. In fact, they amounted to little more than that the carrier should furnish transportation, within the limits of its facilities, to all persons who applied, and that the charges should be reasonable. *Interstate Commerce Commission v. B. & O. Railroad*, 145 U. S. 263, 275.

The duty thus imposed on common carriers by the common law, of course, applied to interstate as well as to intrastate carriage. *Western Union Telegraph Co.*

v. *Call Publishing Co.*, 181 U. S. 92, 102.⁶ This is also demonstrated by a series of railroad cases under the Interstate Commerce Act which involved questions as to the relation between the Act and previously existing common law remedies. Thus, the power to determine the reasonableness of charges, which had long been regarded as "eminently a question for judicial investigation" (*Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 458), was held to have been taken from the courts and vested exclusively in the Interstate Commerce Commission. *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, *supra*, at 443; see *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 384, n. 9. But the common law duty of interstate carriers survived in a wide variety of circumstances not covered by the Act. See *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 129-30.

Assignment to the Commission of exclusive power to determine the reasonableness of rates was not held to be a disavowal by Congress of the common law. Rather, it was recognized for what it was, an incorporation into the statute of the common law's obliga-

⁶ The decision in the *Western Union* case, *supra*, was founded upon the assumption that the federal courts applied the same general body of common law as did the states, and that they could find the content of this common law independently of the decisions of the states. This view has been modified, as to cases arising under the diversity jurisdiction, by *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. *Western Union's* holding that a carrier in interstate commerce is subject to common law liability, absent federal legislation to the contrary, remains unimpaired, however.

tions upon common carriers to make all their charges just and reasonable. *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 167 U. S. 479, 505-6. To be sure, the Interstate Commerce Act made the rates filed in the carrier's tariffs the legal rates for purposes of the statute, but "Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable." *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 383-4.

Congress was aware of these principles when it undertook to regulate interstate motor carriers and must be deemed to have acted in light of them when it enacted Part II of the Interstate Commerce Act. *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 545; *Shapiro v. United States*, 335 U. S. 1, 16; *Helvering v. Winmill*, 305 U. S. 79, 82-83; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 310-315. In language almost identical to that used in Part I (Sec. 6 (7), 49 U. S. C. 6 (7)), Congress made the filed tariff rate the only legal rate which motor carriers could claim.* Section 217 (b), 49 U. S. C. 317 (b). Again, in language almost identical to that used in Part I (Sec. 1 (5) (6), 49 U. S. C. 1 (5) (6)), it declared unreasonable charges to be unlawful and

* The United States, as a shipper, may, of course, be eligible for rates lower than the filed tariff rates. *United States v. Western Pacific R. Co.*, 352 U. S. 59, 76, note 20; *Western Pac. R. R. Co. v. United States*, 255 U. S. 349, 355-356.

made it the duty of motor carriers to establish reasonable rates. Sec. 216 (a) (d), 49 U. S. C. 316 (a) (d). Thus, just as in Part I, Congress incorporated the common law duty to charge reasonable rates and converted it into a federal cause of action. *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370.

2. *The Absence of Remedial Provisions.*—Absence of specific remedial provisions in Part II does not derogate from this conclusion. As has recently been emphasized, the existence of a statutory right implies the existence of an effective remedy unless there is strong evidence to the contrary. *Leedom v. Kyne*, No. 14, October Term, 1958 (decided December 15, 1958); *Harmon v. Brucker*, 355 U. S. 579; *Texas and New Orleans R. Co. v. Railway Clerks*, 281 U. S. 548. Thus, in a recent application of the *Railway Clerks* case, *supra*, this Court said (*Leedom v. Kyne*, *supra*):

In *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U. S. 549, it was contended that, because no remedy had been expressly given for redress of the congressionally-created right in suit, the Act conferred "merely an abstract right which was not intended to be enforced by legal proceedings." *Id.*, at 558. This Court rejected that contention. It said: "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded * * *. The definite prohibition which Congress inserted in the Act cannot therefore be overridden in the view

that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." *Id.*, at 568, 569. * * *

Nonetheless, like the carrier in *Railway Clerks*, petitioners are contending that a peremptory statutory command—that unreasonable rates are unlawful and prohibited—is a mere abstract declaration. Here, indeed, the need for a remedy is even stronger than in *Railway Clerks*, for the statute is an affirmation of a previously existing common law duty not to exact unreasonable charges. *Arizona Grocery Co. v. Atchison, Topeka & S.F. Ry. Co.*, 284 U. S. 370.

The remedy implied by the duty not to charge unreasonable rates does not turn on the presence or absence of authority in the Commission to award reparations against a carrier. Even the cause of action to enforce reparations awards by the Commission under Part I of the Act does not derive from the Commission's power to award reparations, but from the substantive duty imposed by the Act. *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, 660. The reparations award merely creates a rebuttable presumption of liability in a specific amount. *Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412, 430.

Even where the right to affirmative recovery may be destroyed by the running of the statute of limitations (see *William Danzer Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633, 636; *Midstate Co. v. Pennsylvania R. Co.*, 320 U. S. 356, 364), the defense of unlawfulness may be raised against a carrier seeking to enforce

freight charges. *United States v. Western Pacific R. Co.*, 352 U. S. 59.

In *Western Pacific, supra*, three rail carriers sued the United States under the Tucker Act to recover additional charges allegedly due them for the transportation of containers filled with napalm gel. These charges had been computed at the rate specified for "incendiary bombs". The Government defended on the ground that, as a matter of tariff construction, the lower rate specified for gasoline in steel drums applied, and, alternatively, that, if the higher rate governed, it was unreasonable as applied and the issue of reasonableness should be referred to the Interstate Commerce Commission. Granting summary judgment to the carriers, the Court of Claims resolved the tariff construction question adversely to the Government and concluded that a reference to the Commission of the issue of reasonableness was barred because of expiration of the two-year period during which the Government could have sought affirmative relief in an independent reparation proceeding against Western Pacific before the Commission. In reversing, this Court held that the absence of authority in the Commission to entertain such a reparation proceeding and to award affirmative relief to the Government did not abrogate the Government's right to interpose the defense of unreasonableness or justify the lower court's refusal to refer to the Commission the administrative question raised by that defense (352 U. S. at 71-74):

We may assume, without deciding, that the Government would have been barred by § 16 (3)

from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Commission of questions raised by way of defense in suits which are themselves timely brought. * * *

It is argued that this Court has construed § 16 (3) as "jurisdictional" and that the Commission is therefore barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions come to the Commission by way of referral or in an original suit. Reliance is placed upon *A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662; *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633; *Midstate Co. v. Pennsylvania R. Co.*, 320 U. S. 356. But these cases all dealt with affirmative claims for the recovery of transportation charges, and not with referrals incident to suits which were originally brought in time. The teaching of the *Midstate* case, for instance, is that the running of the statute destroys the *right* to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties. But here the Government is not asserting a right to affirmative recovery. It is seeking only to have adjudicated questions raised by way of defense. * * *

It is thus plain from *Western Pacific* that the defense of unlawfulness is fully available to a shipper in a suit to collect unreasonable freight charges. It is equally plain from *Western Pacific* that, where the shipper raises such a defense, the trial court must

stay its hand and refer the issue to the Commission, notwithstanding the lack of power in the Commission to order affirmative relief for the shipper.

3. The Prohibition Against Unreasonable Freight Charges Is Justiciable.—Petitioners contend that *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, forecloses the argument that the language of the Interstate Commerce Act creates a “justiciable legal right” (T. Br. pp. 12-15; D. Br. p. 23). From the premise that there is no affirmative right they leap to the conclusion that there can be no defense. But *Western Pacific* conclusively shows that absence of an affirmative right to recovery does not foreclose the right to defend. Cf. *British Transport Commission v. United States*, 354 U. S. 129, 142; *National Bank v. Republic of China*, 348 U. S. 356, 365. And petitioners’ reliance on this Court’s decision in *Montana-Dakota* is, in any event, misplaced.

Montana-Dakota was a suit in a federal court by one public utility electric company against another to recover past exactions of allegedly unreasonable charges. Since there was no diversity of citizenship between the parties, and thus jurisdiction in the district court would have been lacking had the suit been brought to enforce an asserted common law right, the plaintiff, of necessity, alleged that a right of action had been created by the Federal Power Act itself. This Court held that the declaration in that Act that unreasonable rates are unlawful did not create an enforceable right to recover unreasonable charges.

This holding was based upon two considerations: First, that the criterion for statutory reasonableness did not create a justiciable legal right (341 U. S.

at 251); and, second, that there was plain legislative history to show that Congress did not intend either court or Commission to have the power to award reparations (341 U. S. at 258).

Petitioners' heavy reliance on *Montana-Dakota* ignores the vital fact that that case turned on an interpretation of the Federal Power Act in the specific context of its regulatory purpose and in the light of its legislative history. Unlike the Interstate Commerce Act, the criterion for statutory reasonableness in the Federal Power Act was not adopted against a specific common law background; there was no established common law doctrine requiring sellers of electric power to charge reasonable rates, nor had the reasonableness of such rates been generally regarded as appropriate for judicial determination. Instead, the statute declared a new regulatory obligation previously unknown or inchoate in the law. The Interstate Commerce Act, as we have shown above, was a codification, for purposes of federal regulation, of established criteria and remedies to which common carriers had long been subject (see the discussion, *supra*, pp. 15-19). It can hardly be contended, in the light of the common law's requirements, that a common carrier's duty to charge reasonable rates is not a justiciable legal right. Furthermore, petitioners can point to nothing in the legislative history of the Motor Carriers Act which demonstrates an intent by Congress to strip shippers of their common law protection against exactions of unreasonable freight

charges.⁹ Rather, it must be assumed that when a carrier has been unjustly enriched by the collection of unlawful charges, in direct violation of a statutory command that unreasonable charges not be levied, Congress intended that restitution should continue to be made to the injured party. Cf. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, 347.

B. IF THE INTERSTATE COMMERCE ACT DOES NOT IMPOSE A JUDICIALLY ENFORCEABLE DUTY ON MOTOR CARRIERS TO CHARGE REASONABLE RATES, THEN THE COMMON LAW DOES.

We have shown above that the Interstate Commerce Act itself gives shippers a federal cause of action against common carriers by motor vehicle who exact unreasonable rates. If this view should not prevail, however, then we submit, in the alternative,

⁹ As this Court observed in *American Trucking Assns. v. United States*, 344 U. S. 298, 312, Congress' primary concern when it enacted the Motor Carriers Act of 1935 was to bring order into a chaotic competitive situation in the motor carrier industry. See Sen. Rep. 482, 74th Cong., 1st Sess.; Report of the Federal Coordinator of Transportation, Senate Document No. 152, 73rd Cong., 2d Sess.; Report of the Federal Coordinator of Transportation, House Document No. 89, 74th Cong., 1st Sess. The bill's proponents hoped that regulation of rates by the Interstate Commerce Commission would raise them from the uneconomic levels at which they stood in 1935. Hearings Before Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., To Amend Interstate Commerce Act, Part I, p. 64 (testimony of Federal Coordinator of Transportation Eastman). Neither the debates in the Congress, nor the Committee Reports, nor the reports of the Federal Coordinator of Transportation, reflect an intention by Congress to prevent shippers injured by unlawful rates from recovering compensation from the carrier who made tortious exactions of unreasonable charges.

that the common law remedy described above is preserved by the savings clause in Section 216 (j) of the Motor Carriers Act (49 U. S. C. 316 (j)). The clause expressly provides that nothing in Section 216 "shall be held to extinguish any remedy or right of action not inconsistent herewith". The common law rule, of course, was changed by the Act to the extent that it provided that the Commission, rather than the courts, should exercise the power theretofore exercised by the courts, of determining the reasonableness of rates. See *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 385; *Texas and Pacific R. Co v. Abilene Cotton Oil Co.*, 204 U. S. 426. But the continued existence of the common law remedy is plainly consistent with the Act so long as the issue of reasonableness, which Congress has reserved for the Commission, is referred to the Commission for resolution. *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M. C. C. 337.

Relying upon language in *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446, and *United States v. Interstate Commerce Commission*, 337 U. S. 426, 437, petitioners argue that the shipper's traditional common law remedy was destroyed by the Interstate Commerce Act. But the court in the *Abilene Cotton Oil* case was concerned only with the question of whether shippers had a common law right to a *judicial* determination of the issue of reasonableness. It was this right, previously recognized by the courts in cases arising under the common law, which was modified by the Interstate Commerce Act in order to obtain a nationally uniform standard of

reasonableness. The remedies of the Act, however, were to "be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act" (204 U. S. at 446-7). See *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370, 384. Nor is *United States v. Interstate Commerce Commission*, *supra*, to the contrary. In that case, the court was concerned only with the reviewability of the Commission's findings following a shipper's election to proceed before it under Section 9. The existence of a common law remedy was not even in issue. (See also, the discussion, *infra*, p. 40.)

Petitioner Davidson argues that the existence of a common law remedy would somehow be unconstitutional, citing *Wabash, St. Louis & P. Ry. Co. v. Illinois*, 118 U. S. 557. That case held no more than that the rates to be charged by common carriers for interstate traffic cannot be legislatively prescribed *by the states*. But the existence of a common law remedy in no way conflicts with the constitutional power of Congress to regulate interstate commerce, nor does it in any way impede the free flow of interstate commerce. On the contrary, in the absence of inconsistent federal regulation, the availability of common law remedies against interstate carriers for breach of their duties as common carriers has long been acknowledged. See *Arizona Grocery Co. v. Atchison, Topeka & S. F. Ry. Co.*, 284 U. S. 370; *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Western Union Telegraph Co. v. Call Publish-*

ing Co., 181 U. S. 92; *Interstate Commerce Commission v. B. & O. Railroad*, 145 U. S. 263. With respect to interstate carriers, only obligations which in some way interfere with federal regulation or which affirmatively burden interstate commerce are barred by the Commerce Clause of the Federal Constitution.¹⁰ Cf. *Collins v. American Buslines, Inc.*, 350 U. S. 528. No such interference is possible where the uniformity of regulation contemplated by the Commerce Clause is achieved by reference of the economic issue of reasonableness to the Interstate Commerce Commission.

C. THE DEFENSE OF UNREASONABLENESS WAS PROPERLY REFERRED TO THE INTERSTATE COMMERCE COMMISSION BY THE COURTS BELOW.

Under the primary jurisdiction rule of *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, and *United States v. Western Pacific R. Co.*, 352 U. S. 59, the reasonableness of the rate challenged by the shipper is a matter which cannot be resolved by the courts. When a claim or defense involving this issue is raised in a case over which it has jurisdiction, the court must stay its hand and hold the case in abeyance while the matter is presented to the Commission for resolution. Both petitioners argue that this cannot be done because the Commission lacks

¹⁰ In addition, it must be noted that the asserted constitutional issue could not arise in the present cases since the common law rights of the United States are not determined by the law of any state. *United States v. Standard Oil Co.*, 332 U. S. 301; *United States v. Allegheny County*, 322 U. S. 174; *Clearfield Trust Co. v. United States*, 318 U. S. 363.

authority to make findings as to past shipments. We believe that this argument has no merit and was properly rejected by the courts below.

1. *Statutory Authority.*—The Motor Carriers Act does not contain any express grant of authority under which the Commission may award reparations, and the Commission has never asserted that it has such power. But the Commission does have express statutory authority to investigate the failure of any motor carrier to comply with any provision of the Act (Section 204 (c); 49 U. S. C. 304 (c)):

Upon complaint in writing to the Commission by any person * * * or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part * * *.

It is a violation of the Act for any motor carrier to establish unjust and unreasonable rates (Section 216 (b); 49 U. S. C. 316 (b)) or to make unjust and unreasonable charges (Section 216 (d); 49 U. S. C. 316 (d)). When these sections are read in conjunction with Section 216 (e) (49 U. S. C. 316 (e)), which authorizes the Commission to entertain complaints alleging violations of Sections 216 and 217, the statutory foundation for the Commission's power to investigate excessive or unreasonable past charges is plain. This power does not depend upon authority to award reparations. It derives, without being spelled out in terms, from the specific regulatory powers conferred on the Commission. Cf. *American Trucking Assns. v. United States*, 344 U. S. 298, 312;

United States v. Pennsylvania R. Co., 323 U. S. 612, 616.

2. The Consistent View of the Interstate Commerce Commission That It Is Empowered to Make Findings as to the Reasonableness of Past Motor Carrier Charges.—The Commission's power to inquire into the lawfulness of past charges was challenged within a few years following passage of the Motor Carriers Act. In a series of decisions between 1939 and 1942, Division 5 of the Commission held without qualification that the provisions of the Motor Carriers Act confer power on the Commission to determine whether rates charged in the past were applicable and lawful, and that the absence of reparations authority was not a bar to exercise of this authority. *W. A. Barrows Porcelain Enamel Co. v. Cushman Delivery*, 11 M. C. C. 365, 367; *Dixie Mercerizing Co. v. ET and WNC Motor Transp. Co.*, 21 M. C. C. 491, affirmed on reconsideration, 41 M. C. C. 355; *Kingan and Co. v. Olson Transportation Co.*, 32 M. C. C. 10. It is significant that Division 5 included among its members Commissioner Eastman, who, as Federal Coordinator of Transportation, had been one of the principal architects of the Motor Carriers Act. See Sen. Rep. 482, 74th Cong., 1st Sess.

Then in 1944, in *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M. C. C. 337, the full Commission undertook (*id.* at p. 340) a "thorough reexamination" of its authority to "make an administrative determination of the lawfulness of rates charged on past shipments," in order to establish "a consistent precedent for future guidance". On the basis of this

"thorough reexamination," the Commission unanimously concluded that the earlier decisions of its Division 5 were correct.

At the outset, in the *Bell Potato Chip* case, the Commission referred (*id.* at 341) to the general powers expressly conferred upon it in Sections 216 (b), (d), (e), and 204 (a) (6), (c), (d) of Part II of the Interstate Commerce Act—as well as to "those powers which, upon consideration of the act as a whole, may reasonably be deemed to be implicit in the statute." In this connection, particular emphasis was placed upon the investigative authority conferred by Section 204 (c) (*supra*, p. 29), which, the Commission noted, has no precise counterpart in Part I.

After these preliminary observations, the Commission pointed out that Congress has placed the duties and obligations of rail and motor common carriers with respect to rates and charges upon the same footing (*id.* at 341), and went on (*id.* at 341-342):

To hold that a motor carrier which has violated any of these prescribed duties is immune to civil liability to one injured thereby while rail and water carriers similarly offending must respond in damages would be not only at variance with the fundamental rule of *ubi jus ibi remedium* but would also disregard the provisions of sections 216 (j), 217 (b), and 22, which preserve all common-law and statutory remedies. The statute, by declaring unlawful and prohibiting unreasonable and discriminatory rates, has superseded the common-law

rights but has not abrogated remedies heretofore recognized. * * *

The basic authority to make findings of past unlawfulness is in those provisions of part I, which impose the duty upon the carrier of maintaining reasonable and nondiscriminatory rates. A like administrative jurisdiction is to be found in part II even though the procedural authority has been withheld.

The Commission then considered (*id.* at 343) the circumstances in which its jurisdiction with respect to past rates should be exercised:

* * * The usual purpose of invoking our jurisdiction in adversary proceedings to find past unreasonableness, unjust discrimination, or undue prejudice in motor-carrier rates is to lay the groundwork for a money judgment in a court action. Our determination of such issues in circumstances of this kind is not self executing. Unless the carriers concerned are willing to be governed by our conclusions, our action becomes merely a step preliminary to a suit in court. * * *

In circumstances such as described, it is apparent that precautions should be taken to prevent the filing of frivolous or moot complaints. Without attempting at this time to devise a precise rule, we think it pertinent to point out that, generally speaking, adversary proceedings involving past unreasonableness, unjust discrimination, or undue prejudice under part II should not be brought before us prior to the institution of a suit in court in which damages

are sought predicated upon the unlawfulness alleged in the complaint. The complaint should show that such suit has been brought within the period allowed by the applicable statute of limitations. There may be other situations in which we should exercise this jurisdiction. In this connection, it may be noted that it is a recognized practice to hold in abeyance court proceedings pending the determination by the Commission of administrative questions. *Eastern-Central Motor Carriers Assn. v. United States*, 321 U. S. 194; *General American Tank Car Corp. v. El Dorado Term. Co.*, 308 U. S. 422; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, *supra*; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 304, 314; *Southern Ry. Co. v. Tift*, 206 U.S. 428, 434.¹¹

¹¹ Congress is fully aware of the doctrine of *Bell Potato Chip*, *supra*, and has not seen fit to change it. Since 1945, eight bills have been introduced in the Congress to confer reparations authority on the Commission in motor carrier cases, similar to the reparations authority conferred on the Commission in rail cases by Section 13 (1) of Part I of the Act [49 U.S.C. 13 (1)]. 79th Cong.: H.R. 4872, S. 798; 80th Cong.: H.R. 2324, H.R. 2335, and S. 1194; 83rd Cong.: S. 3707; 84th Cong.: S. 723; 85th Cong.: S. 378. In the course of hearings on such bills, the operation of the *Bell* doctrine has been fully explained. Although shippers have urged that the *Bell* remedy is cumbersome, roundabout and expensive, and that direct reparations authority should be granted the Commission, Congress has declined to change the existing remedies. See Hearings before House Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess., "To Amend the Interstate Commerce Act—Undercharges and Overcharges" (March 18, 19, 1947) pp. 17, 41, 52; Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d Sess., "Miscellaneous Amendments To The Inter-

The Commission recently reaffirmed the *Bell Potato Chip* doctrine in *United States v. Davidson Transfer & Storage Co., Inc.*, 302 I. C. C. 87 (Docket No. MC-C-1849).¹² Thus, the body which is charged with

state Commerce Act (Omnibus Bill)" pp. 16, 66, 106; Hearings before Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., "Surface Transportation Ratemaking Bills" pp. 12, 49, 107, and 137. This refusal by Congress to modify the *Bell* doctrine is entitled to weight, especially in view of the searching examination of shippers' remedies against motor carriers which was made by the Committees during the hearings discussed above. *United States v. Leslie Salt Co.*, 350 U.S. 383, 397; *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 17. Cf. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 545.

¹² In addition to the instant cases, the theory underlying the *Bell* decision has been recognized in *New York & New Brunswick Auto Express Co. v. United States*, 126 F. Supp. 215 (C. Cls.) and *United States v. Garner*, 134 F. Supp. 16 (E. D. N. C.); contra, *United States v. Apicella*, 148 F. Supp. 457 (D. N. J.).

The Commission has exercised its power to determine the reasonableness of rates on past shipments in numerous cases. *E. g., Toledo Steel Tube Co. v. George F. Alger Co.*, 67 M. C. C. 101; *United States Gypsum Co. v. Bos Freight Lines, Inc.*, 63 M. C. C. 212; *J. I. Case Co. v. Rock Island Transfer and Storage Co.*, 62 M. C. C. 453; *Ewald Sales & Supply Co. v. Truck Transport Co.*, 62 M. C. C. 59; *Arma Corp. v. M. & M. Transportation Co.*, 61 M. C. C. 723; *John H. Kalte v. Central Motor Lines, Inc.*, 61 M. C. C. 529; *Manhattan Soap Co. v. Supreme Motor Freight Lines, et al.*, 61 M. C. C. 430; *E. I. Du Pont de Nemours & Co. v. Super Service Motor Freight, Inc.*, 54 M. C. C. 481; *American Greeting Publishers, Inc. v. A. C. E. Transportation Co. Inc.*, 53 M. C. C. 174; *D. E. Bolman Mercantile Co. v. The Santa Fe Trail Transportation Co.*, 48 M. C. C. 561; *Willard Storage Battery Co. v. Associated Transport, Inc.*, 48 M. C. C. 284; *United States Rubber Co. v. Associated Transport, Inc.*, 48 M. C. C. 6; *Southeastern Metals Co. v. Roadway Express, Inc.*, 47 M. C. C. 395; *Glenn L. Martin*

primary responsibility for the administration of the Interstate Commerce Act has consistently held for many years that the Act permits it to render determinations as to the lawfulness of charges on past shipments. Its carefully considered analysis is, of course, entitled to great weight. *Skidmore v. Swift & Co.*, 323 U. S. 134, 140; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; *United States v. Jackson*, 280 U. S. 183, 193; *Fawcett Machine Co. v. United States*, 282 U. S. 375, 378.

3. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., Does Not Foreclose Reference of the Issue of Reasonableness to the Commission.*—Relying upon language in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, petitioners argue that the issue of unreasonableness cannot be referred to the Commission by the district courts, in which the present actions were initiated because neither court nor Commission is competent to determine the issue of economic fact—the reasonableness of rates—upon which the cause of action depends. This argument misconceives both the nature of these suits and the nature of the Commission's jurisdiction.

Both suits are actions against the United States under the Tucker Act by carriers seeking to recover charges on contracts of shipment. There is no doubt that the district court had jurisdiction of the parties

Co. v. W. T. Cowan, Inc., 47 M. C. C. 303, 44 M. C. C. 726; *Rhea Manufacturing Co. v. Acme Fort Freight, Inc.*, 47 M. C. C. 280; *Metzner Stove Repair Co. v. Ranft*, 47 M. C. C. 151; *Victory Granite Co. v. Central Truck Lines, Inc.*, 44 M. C. C. 320; *Armour and Co. v. Bell*, 44 M. C. C. 34.

and of the subject matter (T. R. 2, D. R. 2). As shown above, the United States had the right to defend against the action on the ground that the charges sought to be collected were unreasonable. The question of unreasonableness, admittedly not a question for the court, was referable to the Commission as a question of fact relevant to the Government's defense, which was within the special competence of the Commission. *United States v. Western Pacific R. Co.*, 352 U. S. 59; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422; *Thompson v. Texas Mexican R. Co.*, 328 U. S. 134.

In *Montana-Dakota, supra*, this Court declined to direct the trial court to hold the case in abeyance pending a determination of the reasonableness of the electric power rates there involved by the Federal Power Commission. See 341 U. S. at 253-4. But it did so because, as we have shown above, in the circumstances of that case there was no federally cognizable cause of action before the court. The only federal claim arose from a statute which did not create a cause of action, and the court could not take cognizance of the other issues in the case because there was no diversity of citizenship between the parties. The considerations underlying that decision are obviously inapplicable here, where the issue arises in a cause over which the district court undoubtedly has jurisdiction under the Tucker Act, a jurisdiction which petitioners themselves invoked in their complaints (T. R. 2, D. R. 2).

Furthermore, absence of power to award reparations in an independent action before the Interstate

Commerce Commission does not foreclose the Commission from entertaining, on reference, proceedings to determine the reasonableness of past rates. This is conclusively shown by *United States v. Western Pacific R. Co.*, 352 U. S. 59, 71 (see the discussion, *supra* at pp. 21-22).

In other contexts as well, this Court has held "that in certain kinds of litigation practical considerations dictate a division of function between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts * * *." *Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481, 498. This same view underlies the decisions by the Courts of Appeals in the instant cases. Even though a shipper's remedy for unreasonable charges has been left with the courts, that remedy cannot be meaningfully and justly applied in these cases without concrete resolution by the Interstate Commerce Commission of the economic questions upon which the reasonableness of rates depends.

In cases of this nature, whether a suit will be dismissed or held in abeyance pending administrative action depends entirely upon practical considerations. If the administrative agency appears to have authority to grant complete relief which is, in turn, to be followed by enforcement or other review proceedings in the courts, then the action may be dismissed. *Far East Conference v. United States*, 342 U. S. 570, 576-7. On the other hand, where, as here, the court alone has power to grant the relief sought, issues within the special competence of the administrative agency may

nevertheless be referred to it in order that the trial court may have the benefit of the agency's expert appraisal of the facts. *Federal Maritime Board v. Isbrandtsen Co., supra*, at 498-9. Cf. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. The answer is simply a matter of "business-like procedure." *Far East Conference v. United States, supra*, at 577. Since the Interstate Commerce Commission is without power to grant shippers complete relief from unlawful exactions of unreasonable rates by motor carriers, the correct course was that followed below—to stay the cases pending administrative determination.

4. The "Exhaustion Doctrine" Is Inapplicable Here.—T. I. M. E. sees the issue in terms of a failure to exhaust administrative remedies (T. Br. pp. 20-22). Since the Government did not obtain prospective relief from the tariff rates at the time they were filed, T. I. M. E. argues that it cannot now complain of those rates. Failure to exhaust the quasi-legislative remedy which permits shippers to attack the general, prospective operation of tariff rates does not, however, determine the availability of judicial relief as to unlawful exactions on a particular shipment. Even if it were to be so regarded, "Congress has relieved the Government from filing such anticipatory suits by expressly authorizing the General Accounting Office to deduct overpayments from subsequent bills of the carrier if, on post-audit, it finds that the United

States has been overcharged". *United States v. Western Pacific R. Co.*, 352 U. S. 59, 74.¹³

T. I. M. E.'s argument also ignores the distinction between the exhaustion and primary jurisdiction doctrines (352 U. S. at 63-64):

* * * "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. * * *

In the Motor Carriers Act, Congress vested the Interstate Commerce Commission with "legislative" jurisdiction to prescribe future rates, and investigative jurisdiction to make findings as to rates on past shipments, but it did not confer "judicial" jurisdiction on the Commission to give reparations to shippers injured by being compelled to pay unreasonable rates on past shipments. The economic issue—reasonableness of

¹³ As the Court also noted in *Western Pacific*, the volume of its transportation business "underscores the impossibility of requiring the Government to file anticipatory suits before the I. C. C. in every case where it thinks the carrier might later sue to recover the amount set off by the Government." 352 U. S. at 74, fn. 17.

rates—was assigned to the Commission, but the judicial remedy was, as at common law, left with the courts. Thus, these cases do not involve "exhaustion", for the claim for reparations cannot be "exhausted" in proceedings before the Interstate Commerce Commission; rather, they turn upon the "primary jurisdiction" doctrine as explained in *Western Pacific, supra*.

It is for this reason that the language of *United States v. Interstate Commerce Commission*, 337 U. S. 426, 437-8, stressed by petitioners, is inapplicable here. In that case, this Court indicated that a damage claim under Part I against a rail carrier cannot be initiated in a district court where the claim involves issues of reasonableness calling for exercise of the Commission's primary jurisdiction. But the court was there using the term "primary jurisdiction" not in the sense it was defined in *Western Pacific*, but in the sense that case defined "exhaustion of remedies." The court viewed the reparations authority conferred on the Commission in Part I as an exclusive system of administrative priority under which there could be no judicial action whatever until the administrative remedy had been pursued to a final order. Cf. *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 553; *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 772; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51. This view has no relation to the different pattern of remedies under the Motor Carriers Act.

II

~~SECTION 322 OF THE TRANSPORTATION ACT OF 1940 AUTHORIZES THE GENERAL ACCOUNTING OFFICE TO DEDUCT FROM BILLS SUBSEQUENTLY DUE OVERPAYMENTS OF UNREASONABLE FREIGHT CHARGES BY MOTOR CARRIERS.~~

Petitioner Davidson argues that, even if the United States has a judicial remedy against unreasonable charges by motor carriers, it cannot deduct these charges from bills subsequently due. It contends that the term "overpayment" in Section 322 of the Transportation Act of 1940 (*infra*, p. 45), reserving the right of the United States to deduct the amount of any overpayment to a carrier from any amount subsequently found to be due that carrier, was intended by Congress to be given the limited meaning accorded the term "overcharge", which is defined in Section 204a (5) of the Interstate Commerce Act (49 U. S. C. 304a (5)) as an amount in excess of the filed rate. Davidson refers to nothing in the legislative history of Section 322 to support this suggestion. Moreover, the definition of "overcharge" in Section 204a is in terms limited to matters arising under that section.

The terms "overcharge" and "overpayment" are sometimes used interchangeably. See *United States v. New York, N. H. & H. R. Co.*, 355 U. S. 253; *United States v. Western Pacific R. Co.*, 352 U. S. 59. When so used, in their broad sense, both terms refer to any type of excessive payment to a carrier, irrespective of the reason for the excessive payment. But Congress has given the term "overcharge" a technical meaning (Section 204a (5), *supra*) of much narrower scope than the term "overpayment". That it was per-

fectly aware of the distinction between the two terms is evident from the recent amendment to Section 322 contained in P. L. 85-762. In that statute, Congress struck the term "overpayment" from Section 322 and substituted the term "overcharge". Its express purpose in doing so was to foreclose "the General Accounting Office from deducting amounts resulting from any unilateral determination that applicable rates are unreasonable * * *". H. Rep. No. 2346, 85th Cong., 2d Sess., p. 5. Far from acknowledging that in pre-amendment situations the term "overpayment" was to be narrowed in meaning or scope, Section 3 of P. L. 85-762 expressly provides that " * * * [t]he provision of this Act which amends section 322 of the Transportation Act of 1940 (49 U. S. C. 66) shall apply only to transportation performed and payment made therefor subsequent to the effective date of this Act".

Thus the amendment to Section 322 clearly demonstrates that Congress was fully aware of the technical distinction between the terms "overcharge" and the term "overpayment". And the amendment would have been superfluous if "overpayment", as formerly used, meant nothing more than "overcharge".

The form in which Section 322 was recently amended is itself evidence of the special care which Congress took to avoid any redefinition of "overpayment" which might indicate a legislative interpretation that it formerly meant nothing more than "overcharge". It had been suggested to the House Committee considering the bills (H. R. 8742 and S. 377) which became P. L. 85-762 that, instead of substitut-

ing "overpayment" for "overcharge", the term "overpayment" should be redefined to accord with Section 204a. Pointing to the fact that carriers were asserting in pending litigation that the two terms were synonymous, the Comptroller General vigorously opposed this suggestion, lest its adoption should affect the pending law suits. The Comptroller General urged, instead, that the proposed amendment substitute "overcharge" for "overpayment", and then define "overcharge" specifically. His recommendations were incorporated into the bill as a Committee amendment. See H. Rep. No. 2346, 85th Cong., 2d Sess., on H. R. 8742, pp. 5, 12, 17-18. The bill passed both Houses in this form. 104 Cong. Rec. 14881, 14889 (daily ed.). This legislative history completely refutes any suggestion that Congress viewed "overpayment", as used originally in Section 322, as having the limited meaning later given the term "overcharge".

Finally, petitioner's contention ignores the basic purpose of original Section 322. At this Court stated in *United States v. New York, N. H. & H. R. Co.*, 355 U. S. 253, Section 322 conferred the benefit of prompt payment upon the carrier, but preserved all of the Government's rights to protect the public treasury against unlawful payments to contractual claimants. There can be no question that, prior to 1940, the Comptroller General could have withheld payment of a transportation bill in circumstances where he concluded, on the basis of prior rulings of the Interstate Commerce Commission, that the charges encompassed in that bill violated the Interstate Commerce Act's prohibition against unjust and unreasonable rates.

See, also, *United States v. Western Pacific R. Co.*, 352 U. S. at 74. Congress has now modified this power as to rates deemed unreasonable, but made it plain that this modification has no effect on the instant cases or upon any transportation performed and paid for prior to the effective date (August 26, 1958) of P. L. 85-762.¹⁴

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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JANUARY 1959.

¹⁴ In these suits, the United States is a defendant in the carriers' actions to recover sums recaptured by the General Accounting Office after it discovered, on post-payment audit, that petitioners had been overpaid. The procedure is outlined in *United States v. New York, N. H. & H. R. Co.*, 355 U. S. 253. As a result of the amendment to Section 322 by P. L. 85-762, effective August 26, 1958, the United States will be required to collect "overpayments" of unreasonable charges from motor carriers by suing them in the district courts under 28 U. S. C. 1345. See H. Rep. No. 2346, 85th Cong., 2d Sess., p. 16. The Government retains the power to recoup, by administrative deduction from subsequent bills, the amount of "overcharges", as that term is defined by amended Section 322. But whether the United States is plaintiff or defendant, these questions sub-sist: (1) The right of the Government to secure redress from motor carriers for past illegal exactions; (2) the power of the Commission to consider, on reference from the courts, the underlying transportation issues.

APPENDIX

1. Section 322 of the Transportation Act of 1940, September 18, 1940, c. 722, 54 Stat. 955, 49 U. S. C. 66, provides:

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

2: P. L. 85-762, 85th Cong., August 26, 1958, provides:

SEC. 2. Section 322 of the Transportation Act of 1940 (49 U.S.C. 66) is amended as follows:

(1) By striking the words "overpayment to" and substituting therefor the words "overcharges by".

(2) By adding a new sentence at the end of the section as follows: "The term 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of the Interstate Commerce Act: *Provided, however,* That such deductions shall be made within three years (not including any time of

war) from the time of payment of bills: *Provided further*, That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later."

SEC. 3. The provisions of this Act which amend the Interstate Commerce Act, as amended, shall apply only to causes of action which accrue on or after the effective date of this Act. The provision of this Act which amends section 322 of the Transportation Act of 1940 (49 U. S. C. 66) shall apply only to transportation performed and payment made therefor subsequent to the effective date of this Act.

3. The relevant provisions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, are as follows:

**GENERAL DUTIES AND POWERS OF THE
COMMISSION**

SEC. 204. [49 U. S. C. 304]

(a) It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

* * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative

without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * *

**ACTIONS FOR RECOVERY OF CHARGES;
LIMITATION OF ACTIONS**

SEC. 204a. (5)—[49 U. S. C. 304a. (5)]

The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

* * * * *

**RATES, FARES, AND CHARGES OF COMMON CARRIERS
BY MOTOR VEHICLE**

SEC. 216. [49 U. S. C. 316]

* * * * *

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering prop-

erty for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect.

whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged,

and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatsoever.

Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

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IN THE
Supreme Court of the United States

No. _____

DAVIDSON TRANSFER & STORAGE COMPANY, INC.,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

*To the Honorable, the Chief Justice of the United
States and the Associate Justices of the Supreme
Court of the United States:*

Davidson Transfer & Storage Company, Inc, prays
that a writ of certiorari issue to review the judgment
of the United States Court of Appeals for the District
of Columbia Circuit entered in this cause on April 24,
1958.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It appears as Appendix A hereto, infra, p. 1a. The United States District Court for the District of Columbia, in which court this cause originated, wrote no opinion. Its final order appears at page 9 of the Record filed with this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code. The judgment of the Court of Appeals was entered on April 24, 1958. No petitions for rehearing were filed.

QUESTIONS PRESENTED

1. Does a shipper of property, or a passenger moving, from one State to another by common carrier by motor have a legal right to recover back, by self-help or otherwise, any part of transportation charges paid on the basis of published rates filed with the Interstate Commerce Commission, effective at the time the transportation service was rendered and applicable to it, on the ground that the rates were unreasonable?
2. The Transportation Act of 1940 authorizes the General Accounting Office, upon audit after payment of bills for transportation rendered to the United States by common carriers subject to the Interstate Commerce Act or the Civil Aeronautics Act to deduct the amount of any overpayment to any such carrier from amounts subsequently due such carrier. Does this authority permit the General Accounting Office to make deductions on the ground that in its opinion published rates filed with the Interstate Commerce

Commission, effective at the time the transportation service was rendered, and applicable to it were unreasonable?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and of the Transportation Act of 1940 are set forth in Appendix B hereto, infra, p. 9a.

STATEMENT OF THE CASE

Davidson is a common carrier by motor certificated to operate in interstate commerce by the Interstate Commerce Commission. At various times prior to July 20, 1953, it rendered transportation service to the United States, moving property of the United States in interstate commerce to, from, or through points in the State of New York. Davidson presented bills for its freight charges to the United States and they were paid. The charges were properly computed at the applicable and effective rates filed with the Interstate Commerce Commission in compliance with Section 217(a) of Part II of the Interstate Commerce Act, 49 U.S.C.A. 317(a). Included as part of these filed, applicable and effective rates was what was known as the New York State Surcharge. This was a charge over and above the base rates on all movements to, from, through or between points in the State of New York. Its purpose was to recoup the cost to common carriers by motor of a ton-mile truck tax levied by the State of New York for the privilege of operating motor vehicles on the highways of the State, whether in intrastate or interstate commerce.

On July 20, 1953, after Davidson had rendered the United States the transportation service in question,

the Interstate Commerce Commission, exercising its authority under Section 216(g) of Part II of the Interstate Commerce Act, 49 U.S.C.A. 316(g), found the Surcharge to be unjust and unreasonable and issued an order requiring Davidson and others to cancel it on or before September 4, 1953. The opinion is reported in 62 M.C.C. 117. The Order is reproduced herein as Appendix C, *infra*, p. 14a. Subsequently, on August 21, 1953, the Commission issued a second order postponing the date for cancellation of the Surcharge to October 15, 1953, on which date it was cancelled. This Order is reproduced herein as Appendix D, *infra*, p. 15a.

Thereafter the General Accounting Office of the United States, on post audit of Davidson's freight bills for the transportation service rendered the United States while the New York State Surcharge was in effect, demanded that Davidson refund to the United States the portion of its freight charges that were based on the surcharge. Davidson made refund under protest and, on February 15, 1955, brought suit for breach of contract to recover back in the United States District Court for the District of Columbia under the Tucker Act, 28 U.S.C.A. Sec. 1346 (a) (2). There being no issue of fact joined by the complaint and answer, cross motions for summary judgment were made and, on June 10, 1957, the District Court entered an order granting Davidson's motion for summary judgment and denying the cross motion of the United States.

On August 7, 1957 the United States filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. The case was briefed and argued to Associate Judges Prettyman,

Bazelon and Bastian. Judge Bazelon thereafter disqualified himself under Section 455 of the Judicial Code, 28 U.S.C.A. Sec. 455. On April 24, 1958 the Court issued its opinion by Judge Prettyman, Judge Bastian concurring, and entered judgment reversing the order of the District Court and remanding the cause to it "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective."

REASONS WHY THE WRIT SHOULD BE GRANTED

Preliminary Statement

This is a case of first impression in this Court. The first question presented goes to the very warp and woof of the regulatory scheme of Part II of the Interstate Commerce Act, also known as the Motor Carrier Act, 49 U.S.C.A., Sections 301-327. It has been squarely considered in only one other United States Court of Appeals, viz., the Court of Appeals for the Fifth Circuit in *T.I.M.E., Inc. v. United States*, 252 F. 2d 178, petition for certiorari filed May 26, 1958, No. 1027, October 1957 Term.¹ The second question has never been squarely considered in any Court.

The proper resolution of the first question is of vital significance to the entire motor carrier industry, to the United States in its capacity as a shipper, to the shipping public generally, and to the Interstate

¹ The Interstate Commerce Commission has consistently since its decision in *Bell Potato Chip Company v. Aberdeen Truck Line*, 43 M.C.C. 337 (1944), answered the first question presented yes. However, in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 fn. 5, this Court held erroneous in 1954 an interpretation of the Natural Gas Act that the Federal Power Commission had followed since 1938, saying that "consistent error is still error."

Commerce Commission in the administration of the Motor Carrier Act. The proper resolution of the second question is of vital significance to the General Accounting Office in the discharge of its duties under Section 322 of the Transportation Act of 1940, 49 U.S.C.A. § 66, as well as necessary in order to stabilize the relationship between the United States as a user of transportation service and all types of common carriers—motor, rail, water and air.

The importance of the resolution of the two questions presented by this Court in this case is illustrated by the fact that counsel for Petitioner here is counsel for a large group of motor carriers in 9 separate cases now pending in various United States District Courts and in the Court of Claims. The questions presented here are in issue in all of those cases. As a practical matter, the resolution of them by this Court in this case may well be dispositive of, and will certainly shorten and simplify the litigation of those cases.

A Shipper Has No Right Against Motor Carriers to Reparations for Alleged Unreasonable Rates

The Montana-Dakota Case

The key to the solution of the problem in the first question presented is the proper interpretation and the applicability here of the opinion and holding of this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). That was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern in interstate commerce, grounded on its payment of rates that had been filed with the Federal Power Commission under Section 205(c) of the Federal Power Act. The

gravamen of the complaint was an alleged violation of the requirement of Section 205(a) of that Act that rates be just and reasonable. The complaint alleged that Montana's rates were unreasonably high, that Montana had misled the Commission into accepting the rates by failing to comply with its obligations of disclosure under the Act, that the rates had therefore been improperly established, and that, through interlocking directorates, Montana had fraudulently prevented Northwestern from seeking redress from the Commission while the rates were in effect.

This Court held that the complaint failed to state a cause of action and ordered it dismissed. It held that rate reasonableness is not "a justiciable legal right" but rather "a criterion for administrative application in determining a lawful rate." One "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." 341 U.S. at p. 251. In answer to Montana's argument that the District Court could retain the case on its docket and refer to the Federal Power Commission the issue of the reasonableness of the rates, the Court said:

"But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent. 341 U.S. at p. 254.

The four dissenting Justices, speaking through Mr. Justice Frankfurter, agreed, in his words, that:

"Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a *properly* filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed." 341 U.S. at p. 258; emphasis supplied.

Their dissent was bottomed on the allegation in the complaint that the rates complained of were *not properly filed* with the Commission, i.e., were fraudulently filed. Since there is no claim in this case that any of Davidson's rates were improperly filed, the dissenting opinion is irrelevant on the issue here and the majority opinion must be treated as though it were unanimous.

The Montana-Dakota Case Is Not Distinguishable

Does the *Montana-Dakota* Case control here or is there any basis upon which it can be distinguished? Certainly there is no difference between the provisions of the Federal Power Act and the provisions of Part II of the Interstate Commerce Act from which a distinction can be drawn. Part II of the Interstate Commerce Act was enacted on August 9, 1935, 49 Stat. 543, just 17 days before the Federal Power Act was enacted on August 26, 1935, 49 Stat. 838. Both Acts confer rate regulatory authority on federal commis-

sions by substantively identical provisions couched in substantially the same language. In both Acts the authority to prescribe rates is limited to the fixing of rates prospectively. Section 216(e) of the Interstate Commerce Act provides only for the fixing of rates "thereafter to be observed" and for the fixing of practices "thereafter to be made effective." Section 206(a) of the Federal Power Act provides for the fixing of rates and practices "to be thereafter observed and in force." Both Section 216(g) of the Interstate Commerce Act and Section 205(e) of the Federal Power Act provide that after hearings concerning the lawfulness of rate changes, the Commission may make such order as would be proper in a proceeding respecting existing rates, i.e., an order fixing the rates "thereafter to be observed."

Certainly no distinction between the *Montana* Case and this case can be based on the fact that there the claim of unreasonableness was pleaded by the purchaser of the service in a complaint as giving a substantive right to affirmative relief by way of reparations, while in this case it was pleaded in an answer as a defense to a suit by the seller of the service for its charges. If there is no substantive legal right to any rate other than the filed rate, a suit by a purchaser to recover charges paid on the ground that the filed rate was unreasonable will fail. Conversely, a suit by a seller to recover charges which have not been paid, to which the only defense is an allegation that the filed rate was unreasonable, will succeed. Any other conclusion would make the existence of the substantive rights and obligations of the parties depend upon which one was plaintiff and

which one was defendant. Such a conclusion would be absurd.²

**The Erroneous Distinction
Drawn by the Court Below**

The Court of Appeals attempted to distinguish the *Montana* Case from the case at bar as follows, *infra*, p. 9a:

“The difficulty [in *Montana*] was not lack of a cause of action but lack of a cause cognizable in a federal court . . .”

² There are cases, not to be confused with this one, where a substantive right can be pleaded defensively even though procedurally barred from vindication by way of affirmative relief. See *United States v. Western Pac. Ry.*, 352 U.S. 59. In that case the United States pleaded as a defense to a suit by rail carriers for their charges that the rates were inapplicable and unreasonable. Part I of the Interstate Commerce Act concededly grants a substantive legal right to a reasonable rate *even though different than the filed rate*. Nevertheless, the Court of Claims overruled the defense on the ground that the two year statute of limitations on suits involving rates in Section 16(3) of the Act had run, and that therefore both the Interstate Commerce Commission and the courts were barred from granting the United States affirmative relief, i.e., reparations. This Court assumed without deciding that affirmative relief would be barred by limitations. However, it held that Section 16(3) did not bar the United States from pleading defenses that were *legally sufficient as a matter of substantive law* to a suit by carriers to recover charges. It further held that it did not bar the referral to the Commission of issues raised in those defenses which the Interstate Commerce Act *gave the Commission jurisdiction to resolve* and which were within its special competence. This holding that a statute of limitations bars affirmative relief in vindication of concededly existing substantive legal rights, but does not bar defenses based on those same substantive legal rights, cannot support a holding that whether or not there is a substantive legal right depends on whether the one claiming it is plaintiff or defendant.

On the other hand, said the Court of Appeals, *infra*, p. 9a:

"In the case before us on this appeal there is a federally cognizable cause of action, an alleged breach of contract by the United States, and so this controversy falls outside the *Montana-Dakota* ruling."

In other words the Court of Appeals read *Montana* as denying the existence of a justiciable legal right to a reasonable rate under the Federal Power Act, but at the same time leaving intact whatever common law right existed before its enactment. This reading is in direct conflict with the reading by the Supreme Court of Mississippi in *United Gas Pipe Line Company v. Willmut Gas & Oil Co.*, 97 So. 2d 530, pet. for cert. pending, No. 1021, Oct. Term, 1957, sub nom. *Willmut Gas & Oil Co. v. United Pipe Line Company*. On the same theory the Court denied the existence of a justiciable legal right to a reasonable rate under the Motor Carrier Act, but held that the common law right that existed before its enactment remained intact, and that in this case the right was enforceable in a federal court by virtue of the Tucker Act.

We submit that this is clearly an erroneous reading of the *Montana* holding. It treats the holding as purely procedural, i.e., as merely delimiting the types of causes of action that a federal court can entertain on their merits. The *Montana* Case of course did this. It held that a complaint alleging that a fraudulently filed rate was unreasonable did not state a cause of action that a federal court could entertain on its merits. But this holding was grounded squarely on the fact that a purchaser of electricity in interstate

commerce has no legal right justiciable in any court to any rate other than the rate filed with the Federal Power Commission, whether the filing was fraudulent or not. It follows that the suit would have been dismissed even had their been diversity of citizenship. It also follows that it would have been dismissed had it been brought as a common law action for fraud in a state court.

The foregoing is easily demonstrated. As this Court said in *Montana*, 341 U.S. at p. 252: "Before the [Federal Power] Act [Montana] would have had no statutory right to a reasonable rate, but it did have a common law right not to be defrauded into paying an unreasonable one." 341 U.S. at p. 252. However, it went on, the acts charged by Montana "do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remedial fraud." 341 U.S. at p. 253. But, said this Court, the Federal Power Act gave the Federal Power Commission the exclusive power to fix reasonable rates. At the same time it deliberately withheld from it the power to award reparations or to determine rates retrospectively. The necessary consequence was the abrogation of Montana's common law action. The suggested alternative, reference of the issue of reasonableness to the Commission, was rejected on the ground that it would subvert the statutory scheme by permitting Montana "indirectly to obtain Commission action which Congress did not allow to be taken directly." 341 U.S. at p. 254.

The dissenting Justices did not quarrel with this holding as applied to "properly" filed rates. They agreed that as to such rates there could be no recovery in damages on the ground that they were unreason-

able, under either the Federal Power Act or the common law. "The statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief." 341 U.S. at p. 263.

The Court's Erroneous Theory of the Nature of the Shipper's Right

As we have seen, and as the Court of Appeals here held, Part II of the Interstate Commerce Act, like the Federal Power Act, but in sharp contrast to Part I of the Interstate Commerce Act, confines the rate regulatory authority of the Interstate Commerce Commission to the fixing of rates prospectively. The theory of the Court below was that since Part II of the Interstate Commerce Act did not in terms extinguish the common law right to reasonable rates for past services, "the right itself survived" and the common law remedy survived. *Infra*, p. 7a. This cannot be so.

The common law right to damages for the charging of unreasonable rates in the past was a right to the difference between the reasonable rate and the unreasonable rate. Concededly, under the doctrine of *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 427, 27 S. Ct. 350, no court can determine what this difference is. And as the Court below itself said, Part II of the Interstate Commerce Act failed to give the Interstate Commerce Commission authority to do so, that is, it "failed to provide an administrative forum for adjudication of the damages." *Infra*, p. 7a. Instead, it limited the Commission to the fixing of rates prospectively. It follows that both the common law right and the common law remedy were abrogated, and

that the only judicially cognizable right remaining is that given by the Act, namely, as *Montana* put it, the right to "the filed rate, whether fixed or merely accepted by the Commission."

The Court of Appeals relied on the fact that Section 216(j) of Part II of the Interstate Commerce Act provides that common law remedies "not inconsistent" with the rate regulatory provisions of Section 216 survive its passage. The answer to this is found in the *Abilene* Case, *supra*, 27 S. Ct. at p. 356. That was a common law suit in a state court by a shipper against a rail carrier alleging that an excessive and therefore unreasonable rate had been charged. The shipper argued that the suit was maintainable because Section 22 of the Interstate Commerce Act provides, *inter alia*, that: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies" The breadth of this savings clause is in sharp contrast with the narrowness of the savings clause in Section 216(j). Nevertheless the Supreme Court held that the suit would not lie, saying:

" . . . we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of." 27 S. Ct. at p. 356.

Dealing specifically with the savings clause, this Court said:

"This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." 27 S. Ct. at p. 358.

The *Abilene* holding was specifically affirmed, if not enlarged, as recently as 1949. In *United States v. Interstate Commerce Commission*, 337 U.S. 426, 437, the Supreme Court rejected the Commission's argument that a shipper by rail could vindicate his right to reparations specifically granted by Part I of the Act in a federal district court. It did so notwithstanding that Section 9 gives a shipper alternative remedies, either complaint to the Commission or suit in a federal court. The Court held that "it has been established doctrine since this Court's holding in [the *Abilene* Case] that a shipper *cannot file* a Sec. 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for the exercise of the Commission's primary jurisdiction." Emphasis supplied. Since a cause of action to enforce a right to reparations specifically granted by Part I will not lie, *a fortiori* a common law cause of action to enforce a right to reparations deliberately withheld by Part II will not lie.

A Common Law Right and Remedy Are Unconstitutional

There is another conclusive reason why there can be no common law right or remedy against motor carriers for alleged unreasonable past rates on interstate movements. Common law rights exist only by the

force of state law. There is no federal common law. Moreover, the federal courts are bound by the state courts in the construction and application of the common law of a state. *Erie R. R. v. Tompkins*, 304 U.S. 64. No state has constitutional power to regulate the rates charged by common carriers for transportation from one state to another. *Wabash Ry. v. Illinois*, 118 U.S. 557. It follows that a cause of action for damages for unreasonable rates charged for such transportation would not lie under the common law of any state. A state no more has constitutional power to regulate rates retrospectively through its judiciary than it has to regulate them prospectively through its legislature.

It is no answer to say that the regulation of the rates would as a practical matter be the same as that which the Interstate Commerce Commission would impose had it authority to do so, because its determination of reasonableness would be sought and accepted by the Court. The facts would remain that (1) the right that would be vindicated and the remedy that would be granted would be an exercise of unconstitutional power by the state whose common law was invoked, and (2) the court in which suit was brought would enter a judgment based upon a quasi-judicial determination by the Commission that it has no authority to make under the power delegated to it by the Congress. Cf. *Montana-Dakota, supra*, and *Hope Natural Gas Co. v. F.P.C.*, 134 F. 2d 287, 310 (C.A. 4th 1943), holding that the Federal Power Commission, having only quasi-legislative power, has no power to award reparations under the Natural Gas Act and therefore "certainly no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions."

**The Conflict and
Confusion in the Law**

If ever there was a vital and constantly recurring question of national scope on which the law is conflicting and confused it is the first question presented by this Petition. The Federal Power Commission and at least one state supreme court interpret the *Montana* Case as barring absolutely both the Commission and the courts from either determining past reasonableness or awarding reparations. See *United Gas Pipe Line Co. v. Willmut Gas and Oil Co.*, 97 So. 2d 530 (Miss. 1957) petition for certiorari pending, No. 1021, October Term, 1957, sub nom. *Willmut Gas and Oil Co. v. United Gas Pipe Line Co.* The Interstate Commerce Commission interprets the *Montana* Case as barring it from awarding reparations against motor carriers, but not as barring determinations of past reasonableness. See *U. S. v. Davidson Transfer & Storage Co., et al.*, 302 I.C.C. 87 (1957).³

The Court of Appeals here held that there was a common law right to reparations against a motor carrier. The Commission in the *Bell Potato Chip* Case, *supra*, at p. 342, held that the Interstate Commerce Act "superseded the common law right." The District Court for the Western District of Virginia, faced with a motion to dismiss a suit for reparations by a private shipper for lack of diversity of citizenship on the authority of the reading of the *Montana* Case by the Court of Appeals here, held that a shipper had both "a theoretical action at common law" and an action under an Act of Congress regulating com-

³ The cited *Davidson* Case is not part of or factually or procedurally related to the instant case, although between the same parties.

merce. *Lynchburg Traffic Bureau v. Smith's Transfer Co.*, C.A. 414, Lynchburg Division.

This Court in *U. S. v. Interstate Commerce Commission, supra*, held that a suit for reparations could not be initiated until after the Commission had determined the past reasonableness of the rate. The Commission dismisses complaints to it seeking the determination of past reasonableness unless a suit for reparations is pending when the complaint is filed, *Sinclair Pipe Line Co. v. Transamerican Freight Lines*, No. MC-C-2035, decided April 28, 1958. If the complaint assails both present and past reasonableness the Commission determines the former but, absent the pendency of a suit in court, refuses to determine the latter. *Schlonsker, Trustee v. Ellis Trucking Co., et al.*, No. MC-C-1786, decided January 20, 1958. In one and the same breath, in a case in which the only issue is the reasonableness of past rates, the Commission says that its function is to determine the issue of reasonableness, but that "it is not our province to pass on the ultimate questions of whether complainants or defendants would prevail" in court. *U. S. v. Davidson Transfer & Storage Co., et al., supra*.

We submit that the first question presented in this Petition should be laid to rest and the correct law on it spelled out by the Supreme Court of the United States.

The General Accounting Office Has No Authority to Deduct From Amounts Due Carriers on the Ground That in Its Opinion Filed and Applicable Rates Are Unreasonable

Basis for Considering the Question

If a shipper has no legal right against a common carrier by motor to any rate other than the filed rate, obviously the General Accounting Office has no authority to deduct charges paid on the basis of a filed and applicable rate from amounts otherwise due common carriers on the ground that the filed rate was unreasonable. In other words, if the first question presented in this Petition be answered no, the second question will be moot. Therefore, we assume *arguendo* in the discussion that follows that the first question is answered yes. The fact that this second question was not considered by the Court of Appeals neither forecloses nor militates against its consideration here. It is a naked question of statutory interpretation which does not turn on the facts of any particular case. It was not considered by the Court of Appeals because, although Davidson argued it in support of its motion for summary judgment, the District Court did not consider it and therefore neither party raised it in brief or argument.

The Action of the Court Was Error Under the Interstate Commerce Act

The Court of Appeals held that it was not clear from the findings of the Interstate Commerce Commission in *Surcharges—New York State*, 62 M.C.C. 117, whether it "meant to find the surcharge an unreasonable rate during the then-past period when it was in effect." Infra, p. 8a. Consequently, although it reversed the judgment for Davidson for its charges, it did not enter judgment for the United States. Rather,

it remanded the cause to the District Court "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective. Upon receipt of that finding the District Court will proceed to the adjudication of the action before it." Infra, p. 9a.

We submit that this action was erroneous. Until the Interstate Commerce Commission finds a rate unreasonable and prescribes another in lieu thereof, a carrier rendering transportation service to which the rate is applicable is entitled, indeed is bound in law, to collect and retain charges based on it. The General Accounting Office therefore unlawfully deducted the surcharge from amounts otherwise due Davidson and Davidson is entitled to the judgment the District Court gave it.⁴

The whole statutory scheme of rate regulation of common carriers under both Part I and Part II of the Interstate Commerce Act makes a distinction between overcharges and charges based upon allegedly unreasonable rates. Thus, Section 217(a) of the Interstate Commerce Act requires the filing of tariffs. Section 217(b) forbids carriers to "charge or demand or collect or receive a greater or less or different compensation" than that specified in the filed tariffs. Section

⁴ There were actually no deductions in this case. Following its custom, the General Accounting Office made demand on Davidson for refund of the alleged overpayments, stating that if it were not made within 60 days deductions against other bills would be made. Because deductions complicate its accounting procedures Davidson, as do many carriers, made refund under protest. This has been uniformly treated by the General Accounting Office, the carriers and the courts as the equivalent in law of deduction.

222(c) subjects to criminal penalties "Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof" who shall "assist, suffer or permit any person . . . natural or artificial, to obtain transportation of . . . property for less than the applicable rate . . .".

The Interstate Commerce Commission has exclusive authority to determine that applicable rates are in fact unreasonable, and shippers are bound to pay applicable rates, whether or not they think them unreasonable, until the Commission, acting after notice and hearing under the Act, (Section 15(1) rail or Section 216(e) motor) finds that such rates are unreasonable and prescribes reasonable rates in lieu of them. *T. & P. Ry. v. Abilene Cotton Oil Company*, 204 U.S. 426 (1907); *Arizona Grocery Company v. Atchison, T. & S. F. Ry.*, 284 U.S. 370 (1932); *Loveless Mfg. Co. v. Roadway Express*, 104 F. Supp. 809 (D.C. Okla. 1952); *Pyramid Nat. Van Lines v. Goetze*, 65 A. 2d 595 (Mun. App. D.C. 1949).

On the other hand, overcharges as defined in the Interstate Commerce Act may be recovered without resort to the Commission. They may be recovered in Court without reference to the Commission. See *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285; *U. S. v. Western Pac. R. Co.*, *supra*, 352 U.S. at p. 69. They may be voluntarily refunded by the carrier. As early as 1910 the Commission held that there "should be no necessity for appealing to governmental authority to award damages for plain overcharges. It is the plain duty of the carriers to collect no more than the published rate; to do otherwise is a crime for which indictment will lie and for which there is serious punishment provided in law against both the carrier and its

agent." *National Refrigerator and Butcher Supply Co. v. Illinois Central R.R. Co.*, 20 I.C.C. 64, 65.

In short, a common carrier, in accord with his obligations under the Interstate Commerce Act to abide his tariffs, is under a duty to refund overcharges upon demand. But, by the same token, he is under a duty to collect and a shipper under a duty to pay charges based on legal, applicable rates, whether or not those tariffs are, or are thought to be, unreasonable, and even though rates other than applicable rates have been charged over a long period of time. *Aetna Plywood & Veneer Co. v. Indianapolis Forwarding Co.*, 52 M.C.C. 591, 594 (1952). To do otherwise is to violate the Interstate Commerce Act. On more than one occasion a carrier has been "admonished that its duty as a common carrier under the Interstate Commerce Act is to make certain that the applicable fares are collected." *Alexandria, Barcroft & Washington Fares Between the District of Columbia & Virginia*, 48 M.C.C. 613, 626 (1948).

**The Transportation Act of 1940
Gives No Authority to Deduct
for Unreasonableness**

The body of fundamental law just set forth is applicable whether the transportation service is rendered to the United States or to a private person. Section 321 of the Transportation Act of 1940 requires the United States to pay "the full applicable commercial rates" for the transportation service rendered it by a common carrier subject to the Interstate Commerce Act unless special contracts are entered into pursuant to Section 22 of that Act, which was not done here. Section 322 requires the United States to pay for transportation

service by common carriers "upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office", but reserves the right in the United States "to deduct the amount of any *overpayment* to any such carrier from any amount subsequently found to be due such carrier." Emphasis supplied.

This Court, in *U. S. v. N. Y., N. H. & Hartford R. R.*, 78 S. Ct. adv. 212, considered in detail the history of Section 322 of the Transportation Act of 1940. Prior to its adoption the United States "protected itself against transportation overcharges by not paying transportation bills until the responsible government officers, and, in doubtful cases, the General Accounting Office, first audited the bills and found that the charges were correct." 78 S. Ct. at p. 214.

"[T]he Congress was desirous of aiding the [carriers] to secure prompt payment of their charges, but it is also clear that the Congress, and the [carriers], contemplated that the Government's protection against *overcharges* available under the preaudit practice should not be diminished. The burden of the carriers to establish the correctness of their charges was to continue unabridged. The carriers were to be paid immediately upon submission of their bills but the carriers were in return promptly to refund *overcharges* when such charges were administratively determined. The carrier would then have 'to re-collect' the sum refunded by justifying its bills to the agency or by proving its claim in the courts." 78 S. Ct. at p. 216. Emphasis supplied.

To assure compliance by carriers with their obligation to refund overcharges "administratively determined," Section 322 conferred on the "United States Government" authority "to deduct the amount of any

overpayment" from other amounts due them. Obviously the key to the reach of this authority is the meaning of the word "overpayment". We submit that what is an overpayment by a shipper is necessarily an overcharge by a carrier. The two are correlative terms. Therefore, that which is not an overcharge is not an overpayment. Section 204a(5) of the Interstate Commerce Act specifically defines overcharges by a motor carrier "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." This is the identical definition of overcharges by a rail carrier made in Section 16(3)(g) of the Act. An overcharge and its correlative, an overpayment, are thus legislatively defined to exclude charges or payments properly and accurately computed on applicable rates.

In the light of the foregoing, we submit that Section 322 of the Transportation Act of 1940 does not authorize deduction on the ground that the General Accounting Office thinks applicable rates unreasonable. That this Court so interprets Section 322 is implicit in the opinion in the *New Haven* case. The Court uses the terms "overcharge" and "overpayment" interchangeably. It refers to the duty of carriers "promptly to refund overcharges" that have been "administratively determined", referring to the determinations made by "the responsible government officers" or the General Accounting Office. Again, it speaks of the carriers' burden of proving the "correctness of their charges", either to "the agency" or "in the courts".

All of this is absolutely inconsistent with a right in the Government to recoup charges properly and accurately computed on applicable rates unless the Inter-

state Commerce Commission has first (1) found those rates unreasonable and (2) prescribed reasonable rates in lieu of them. As was said in *Montana-Dakota*, 341 U.S. at p. 251:

"Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high . . . To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."

Thus, neither the "responsible government officers" nor the General Accounting Office can "administratively determine" rate reasonableness. Nor can the courts determine it. Therefore, the reasonableness of the carriers' rates cannot be part of their burden of proving "the correctness of their charges".

The United States does not claim here that Davidson's charges were not correct, i.e., not properly and accurately computed on filed and applicable rates. In these circumstances the General Accounting Office had no authority to deduct them from other amounts due Davidson. That Office having unlawfully deducted them, Davidson had a right "to re-collect" them in court. This was the right the judgment of the District Court vindicated. The Court of Appeals, in reversing that judgment, in effect interprets Section 322 as repealing the Interstate Commerce Act *pro tanto* by giving the General Accounting Office the prerogative of "administratively determining" rate reasonableness. This is a prerogative that not even the Interstate Commerce Commission has. It can determine rate reason-

ability only in accord with the specific procedures prescribed by the Congress in the Interstate Commerce Act and the Administrative Procedure Act to assure a full and fair hearing and findings supported by substantial evidence.

Finally, the effect of reversing Davidson's judgment for its charges is to vitiate Section 321 of the Transportation Act of 1940, i.e., to relieve the United States of its obligation under that Section to pay "the full applicable commercial rates, fares, or charges" for transportation service rendered it by common carriers subject to the Interstate Commerce Act. Under the holding of the Court of Appeals the General Accounting Office can "administratively determine" that applicable rates are unreasonable and force refund of charges based on them. The carrier must then either bring suit or give up. If he brings suit he must not only prosecute his claim in court but in a proceeding before the Interstate Commerce Commission, where, under the rule of the *New Haven* Case, he presumably has the burden of proving that rates filed with and accepted by the Interstate Commerce Commission are reasonable—a burden that is not his under the Interstate Commerce Act. Faced with this prospect, and since deductions based on charges by any particular carrier computed on any particular rate are ordinarily small, e.g., \$18.34 in this case, the carrier usually has to give up. The practical result is that, as far as transportation for the United States is concerned, the General Accounting Office has assumed the rate regulatory function of the Interstate Commerce Commission.

CONCLUSION

For the reasons set forth in this Petition, Davidson Transfer & Storage Co., Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit and that upon review of the Record in that Court its judgment be reversed and the cause remanded to it with directions to re-instate the judgment of the United States District Court for the District of Columbia.

Respectfully submitted,

BRYCE REA, JR.

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Counsel for Petitioner

Dated: JUNE 11, 1958

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14123

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDSON TRANSFER & STORAGE COMPANY, INC., APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided April 24, 1958

Mr. Alan S. Rosenthal, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, *Mr. Paul A. Sweeney*, Attorney, Department of Justice, and *Mr. Melvin Righter*, Attorney, Department of Justice, at the time the brief was filed, were on the brief, for appellant. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellant.

Mr. Bryce Rea, Jr., for appellee. *Mr. Donald E. Cross* also entered an appearance for appellee.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

Prettyman, Circuit Judge: This is a civil action brought in the District Court against the United States under the Tucker Act¹ on a contract. The plaintiff was Davidson Transfer & Storage Company, Inc., appellee here, a motor carrier. The contract was for the carriage of goods from Poughkeepsie, New York, to Bellbluff, Virginia. The District Court, on cross motions for summary judgment, rendered judgment for Davidson.

¹ 28 U.S.C. § 1346(a)(2).

The State of New York had levied a ton-mile truck tax for the privilege of operating motor vehicles on its highways. Davidson filed with the Interstate Commerce Commission, as a tariff, a surcharge which purported to cover this tax. On the bills of lading here involved the Government paid the full tariff rate, including the surcharge. Later, upon a threat of offset pursuant to audit by the General Accounting Office, Davidson repaid to the Government the amount of the surcharge. Davidson then filed its suit to recover.

Davidson filed its tariff with the Interstate Commerce Commission on October 8, 1951. The Commission suspended the effective date for seven months, the maximum period allowed by the statute.² By the end of that period the Commission had not completed its inquiry, and the filed tariff went into effect on May 8, 1952. Thereafter, on July 20, 1953, the Commission issued its findings and order, concluding that the New York tax should be treated as a normal operating expense, to be reflected in the carriers' rates rather than in surcharges, and further concluded that the surcharges were unjust and unreasonable. The Commission ordered the surcharges cancelled, and they were cancelled on October 15, 1953. The transportation for which the amounts here in dispute were paid occurred during the period when the surcharges were in effect, that is, between May 8, 1952, and October 15, 1953.

The contentions of the parties, summarized, are:

United States.

While the Interstate Commerce Commission cannot award reparations in motor-carrier cases, it has the power and duty to determine the reasonableness of a past motor-carrier rate which is at issue in a judicial proceeding. The Commission has consistently so held in a line of cases culminating in *Bell Potato Chip Co.*

² Sec. 216(g), Interstate Commerce Act, 49 STAT. 559 (1935), 52 STAT. 1240 (1938), 54 STAT. 924 (1940), 49 U.S.C.A. § 316(g).

v. *Aberdeen Truck Line*,³ recently reaffirmed in another case involving our present appellee.⁴ The reasoning in those cases is that the Commission has broad power to enforce compliance with the statute; that Congress has forbidden unjust and unreasonable rates; that to allow recovery of an unlawful charge would be inconsistent with the statutory preservation of shippers' common-law remedies; and that, unless the Commission's assistance were sought on the issue of the reasonableness of a rate in a judicial proceeding, the purpose of the primary jurisdiction rule would be totally frustrated. Other courts, notably the Court of Claims,⁵ have looked to the Commission for aid in the disposition of suits involving the reasonableness *vel non* of past motor-carrier rates. The Supreme Court, in two recent cases,⁶ has dispelled all doubt as to the Commission's jurisdiction to find a past motor-carrier rate unreasonable, and its lack of jurisdiction to award reparations does not affect the necessity of deferring to the Commission's view on questions raised in a judicial proceeding by way of defense and within the Commission's primary jurisdiction. *Montana-Dakota*⁷ is not to the contrary.

Davidson.

As long as the surcharge was in effect the United States was bound to pay it and the carrier was bound to collect it. The failure of the Commission to make its suspension order effective immediately shows the findings were directed solely to the future. The findings show the Commission was not concerned with

³ 43 M.C.C. 337 (1944).

⁴ *United States v. Davidson Transfer & Storage Co.*, No. MCC-1849 (Oct. 14, 1957).

⁵ *New York & New Brunswick Auto Exp. Co. v. United States*, 126 F. Supp. 215 (1954).

⁶ *United States v. Western Pac. R.R.*, 352 U.S. 59, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956); *United States v. Chesapeake & Ohio Ry.*, 352 U.S. 77, 1 L. Ed. 2d 140, 77 S. Ct. 172 (1956).

⁷ *Montana-Dakota Co. v. Pub. Serv. Co.*, 341 U.S. 246, 95 L. Ed. 912, 71 S. Ct. 692 (1951).

unreasonable ness but with correcting for the future an undesirable rate structure. When the Commission intends to make findings as to a past unreasonableness, it does so on specific terms. If reparations could not be had directly by suit, they cannot be had indirectly by withholding payment. The power of the General Accounting Office to offset payments to carriers does not give the United States greater rights than private shippers have. Nor does the fact that the carrier and not the shipper brought this suit make any difference. The question is whether the United States has a justiciable legal right to any rate other than the filed rate. It is immaterial whether the United States is plaintiff or defendant. The case is therefore distinguished from *Western Pacific*.⁸ The District Court soundly reasoned that to permit the United States to refuse to pay the filed and effective surcharge would be to convert the power of the Commission to suspend for seven months into the power to suspend completely. If Congress had so intended it would have said so. It so provided in respect to rail carriers in Part I of the Interstate Commerce Act; its failure so to provide in respect to motor carriers was clearly deliberate. The rate-making power of the Commission over motor carriers is prospective only. One result of this restriction is that a shipper may be deprived of his right to reasonable rates for a limited time while rates are under investigation. Another result is that a carrier may suffer a similar deprivation. Both results are examples of "regulatory lag", an inevitable consequence of the statutory scheme. Rate reasonableness is not a justiciable legal right but rather a criterion for administrative application. The only legal rate is the filed rate. The Supreme Court so held in *Montana-Dakota, supra*. The reason the buyer's complaint in that case failed to state a federally cognizable cause of action was that charging an unreasonable filed and effective rate did not constitute a violation of a justiciable legal right. It makes no difference whether the right is alleged by complaint for reparations or as defense to a suit for charges. In

⁸ *United States v. Western Pac. R.R.*, 352 U.S. 59, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956).

Western Pacific, supra, the Court merely held that the Court of Claims must refer the question of reasonableness to the Commission because of the facts in the case and the ambiguity of the tariff. The Interstate Commerce Act gives shippers a legal right to reparations in rail charges but does not do so in motor-carrier charges. In the motor-carrier cases upon which the United States relies, this issue was not raised. Whatever common-law right a shipper may have had to recover for unreasonable rates was superseded by Part II of the Interstate Commerce Act. Such a common-law right would be inconsistent with the statute.

The basic issue whether, after the passage of the Interstate Commerce Act, a shipper by motor carrier has a right to a reasonable rate, cognizable in court as a defense to a claim for the amount of a filed and effective rate. We think the United States must prevail on this issue.

At common law a shipper had a right to a reasonable rate. The Interstate Commerce Act preserved that concept in respect to both railroads and motor carriers, declaring it to be the duty of every common carrier to establish just and reasonable rates⁹ and declaring every unjust and unreasonable rate to be unlawful.¹⁰ The statutory scheme of procedure and power in respect to rail carriers is in Part I of the Act,¹¹ principally in Sections 15 and 16;¹² and in respect to motor carriers it is in Part II,¹³ principally Section 216.¹⁴ Both Part I and Part II provide that when a complainant alleges that a rate being charged

⁹ 41 STAT. 475 (1920), 49 U.S.C.A. § 1(5); 49 STAT. 558 (1935), 49 U.S.C.A. § 316(a) and (b).

¹⁰ 41 STAT. 475 (1920), 49 U.S.C.A. § 1(5); 49 STAT. 558 (1935), as amended 54 STAT. 924 (1940), 49 U.S.C.A. § 316(d).

¹¹ 24 STAT. 379 (1887), as amended, 49 U.S.C.A. § 1 *et seq.*

¹² *Id.*, 49 U.S.C.A. §§ 15, 16.

¹³ 49 STAT. 543 (1935), as amended, 49 U.S.C.A. § 301 *et seq.*

¹⁴ *Id.*, 49 U.S.C.A. § 316.

is unreasonable the Commission shall determine the lawful rate to be thereafter observed. Part I, relating to rail carriers, proceeds further and provides that the Commission may award damages in such a case and direct the carrier to pay them.¹⁵ Such an order is enforceable in a civil action by a federal district court. But Part II of the Act, relating to motor carriers, contains no provisions similar to these latter provisions of Part I: No authority is conferred on the Commission to award damages in respect to motor-carrier rates.

A similar situation exists in respect to proposed new rates. In both rail and motor-carrier cases the Commission may suspend a proposed new tariff for a limited time and determine the reasonable rate. If the tariff has gone into effect due to the expiration of the suspension, the Commission may, in the case of a rail carrier, order a refund to the shipper of the charged and collected excess over the reasonable rate.¹⁶ But no provision as to refunds appears in Part II of the Act, relating to motor carriers.

A filed rate determined by the Commission to be reasonable is not only the legal rate but also the lawful rate. This was thoroughly explained in the *Arizona Grocery* case.¹⁷ While that case dealt with rail carriers, its doctrines seem clearly applicable to motor carriers. The Court held that the Commission cannot disavow its legislative rate-making action and award reparations upon a different finding of reasonableness. If, on the other hand, the rate is carrier-made, not determined by the Commission to be reasonable, a shipper may complain and the statutory provisions we have described take effect.

¹⁵ 34 STAT. 590 (1906), as amended, 49 U.S.C.A. § 16(1).

¹⁶ 36 STAT. 552 (1910), as amended, 49 U.S.C.A. § 15(7).

¹⁷ *Arizona Grocery v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 76 L. Ed. 348, 52 S. Ct. 183 (1932).

The surcharge now before us, imposed by a motor carrier, had been filed and was effective but was not a Commission-approved rate. We think a shipper by motor carrier was not deprived of his right to a reasonable rate because of the failure of Congress to give the Commission the adjudicatory function, a quasi-judicial power, of awarding reparations. He was merely left to his old remedy, *i.e.*, a civil action in court.

Absent a statute creating a special forum, a shipper's common-law rights were enforceable in court upon a complaint seeking reparations for unreasonable charges collected by a carrier.¹⁸ The motor-carrier Part of the Interstate Commerce Act specifically provides that all remedies not inconsistent with its provisions regarding rates survive its passage.¹⁹ Failure to provide in a new statute a new remedy is not inconsistent with the retention of an existing common-law remedy. Since the Act did not extinguish the right to reasonable rates for past services but merely failed to provide an administrative forum for

¹⁸ Arizona Grocery v. Atchison, Topeka & Santa Fe Ry., *supra*; Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 436, 51 L. Ed. 553, 27 S. Ct. 350 (1907); Lewis-Simas-Jones Co. v. Southern Pac. Co., 283 U.S. 654, 660, 75 L. Ed. 1333, 51 S. Ct. 592 (1931); Interstate Commerce Comm'n v. Cincinnati, New Orleans & T. P. Ry., 167 U.S. 479, 505-506, 42 L. Ed. 243, 17 S. Ct. 896 (1897); Interstate Commerce Comm'n v. Baltimore & Ohio R.R., 145 U.S. 263, 36 L. Ed. 699, 12 S. Ct. 844 (1892); Dow v. Beidelman, 125 U.S. 680, 687, 31 L. Ed. 841, 8 S. Ct. 1028 (1888); Western Union Tel. Co. v. Call Pub. Co., 181 U.S. 92, 102, 45 L. Ed. 765, 21 S. Ct. 561, (1901); Mitchell Coal Co. v. Pennsylvania R.R., 230 U.S. 247, 264, 57 L. Ed. 1472, 33 S. Ct. 916 (1912); Tift v. Southern Ry., 138 Fed. 753, 759, (C.C.W.D. Ga. 1905), *aff'd*; 206 U.S. 428, 51 L. Ed. 1124, 27 S. Ct. 709 (1907); Smith v. Chicago & N.W. Ry., 49 Wis. 443, 5 N.W. 240 (1880); West Virginia Transportation Co. v. Sweetzer, 25 W. Va. 434, 444 *et seq.* (1885); BEALE & WYMAN, RAILROAD RATE REGULATION 12-15 (1906); II SHARFMAN, INTERSTATE COMMERCE COMMISSION 393-406 (1931).

¹⁹ 49 STAT. 560 (1935), 49 U.S.C.A. § 316(j).

adjudication of the damages, the right itself survived and the old remedy survived.

The remainder of the answer to the pending controversy falls rapidly into place. Dayidson had a right to sue for its filed charges; the United States, a shipper, had a right to defend upon the ground that the claimed rate was unreasonable. At that point the doctrine of primary jurisdiction comes into play, and the *Western Pacific* case, *supra*, requires that the court refer the issue of reasonableness to the Commission. We need not here analyze that case.

We think the Commission's findings in respect to the proposed tariff were not sufficiently clear to serve as the basis for judicial judgment upon the complaint. It is not clear whether the Commission meant to find the surcharge an unreasonable rate during the then-past period when it was in effect.

We find ourselves in accord with the opinion of the Fifth Circuit in *United States v. T.I.M.E., Incorporated*.²⁰

Montana-Dakota, *supra*, is not to the contrary. That was a lawsuit between two private utility companies, one claiming that the other had charged it unreasonable rates for electric energy. The plaintiff sued for the excess above a reasonable rate. The problem was whether it stated a federally cognizable cause of action. There was no diversity of citizenship, so a federal court could not entertain the suit absent some special federal statute. The plaintiff presented an ingenious theory. It said that a fraud, due to an interlocking directorate of supplier and suppliée, prevented it from appealing to the Federal Power Commission to fix a reasonable rate, and that therefore its suit was one to enforce the Power Act, which Act entitled it to reasonable rates. But the Supreme Court pointed out that alleged fraud adds nothing to federal jurisdiction. The plaintiff urged that the Commission had no

²⁰ 252 F. 2d 178 (1958).

power to grant reparations; but again it was clear that this lack created no federally cognizable cause of action. The difficulty was not lack of a cause of action but lack of a cause cognizable in a federal court.

Sentences from the opinion are urged upon us by Davidson to support its position, but we think the Court was discussing the case before it and not broad general principles inapplicable to its pending problem. That it was thus minded is apparent enough if its discussion is read carefully and in full context. In the case before us on this appeal there is a federally cognizable cause of action, an alleged breach of contract by the United States, and so this controversy falls outside the *Montana-Dakota* ruling.

The cause will be remanded to the District Court with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective. Upon receipt of that finding the District Court will proceed to the adjudication of the action before it.

Reversed and remanded.

BAZELON, *Circuit Judge*, heard oral argument but did not participate in consideration or decision of this case.

APPENDIX B

Statutes Involved

Section 322 of the Transportation Act of 1940, September 18, 1940, c. 722, 54 Stat. 955, 49 U.S.C.A. Sec. 66 provides:

"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presenta-

tion of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

The relevant portion of Section 216 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 558, 49 U.S.C.A. Sec. 316(e), (g) and (j) provides:

"(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. Whenever, after hearing, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective. * * * "

"(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once

and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period.**

"(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

The relevant portion of Section 204a of Part II of the Interstate Commerce Act, June 29, 1949, c. 272, 63 Stat. 280, 49 U.S.C.A. Sec. 304a(5), provides:

"For recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

"The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

The relevant portion of Section 15 of Part I of the Interstate Commerce Act, as amended February 28, 1920, c. 91, 41 Stat. 486, 49 U.S.C.A. Sec. 15(7) provides:

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such in-

crease, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. * * *

The relevant portion of Section 16 of Part I of the Interstate Commerce Act, as amended June 7, 1924, c. 325, 43 Stat. 633, September 18, 1940, c. 722, 54 Stat. 913, provides:

“All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

“For recovery of overcharges action at law shall be begun of complaint filed with the commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.”

“The term ‘overcharges’ as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.”

APPENDIX C**Order**

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 20th day of July, A.D. 1953.

INVESTIGATION AND SUSPENSION DOCKET No. M-3929

SURCHARGES—NEW YORK STATE

No. MC-C-1339

SURCHARGES—NEW YORK STATE

It appearing, That in Investigation and Suspension Docket No. M-3929, by orders entered October 5, 1951; and later, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the schedules described in said orders, and suspended the operation of such schedules to May 8, 1952, when they became effective;

It further appearing, That in No. MC-C-1339, by order dated October 26, 1951, the Commission instituted an investigation into and concerning the reasonableness and lawfulness otherwise of the surcharges described in such order;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that the Commission, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents in I. & S. No. M-3929 be, and they are hereby, notified and required to cancel the proposed schedules on or before September 4, 1953, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act.

It is further ordered, That the respondent in No. MC-C-1339, Mathews Trucking Corporation, be, and it is hereby, notified and required to cancel the surcharges under investigation, on or before September 4, 1953, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act.

And it is further ordered, That these proceedings be, and they are hereby, discontinued.

By the Commission.

/s/ **GEORGE W. LAIRD**
Acting Secretary

APPENDIX D

Order

At a General Session of the **INTERSTATE COMMERCE COMMISSION**, held at its office in Washington, D.C., on the 21st day of August, A.D., 1953.

INVESTIGATION AND SUSPENSION DOCKET No. M-3929

SURCHARGES—NEW YORK STATE

No. MC-C-1339

SURCHARGES—NEW YORK STATE

Upon further consideration of the record in the above-entitled proceedings and upon consideration of petitions by Motor Carriers Tariff Bureau, Inc., Central States Motor Freight Bureau, Inc., and Middle Atlantic Conference for postponement of the effective date of the Commission's order of July 20, 1953, and of a reply to the petitions by The Port of New York Authority, and good cause appearing therefor:

It is ordered, That the said order of July 20, 1953, which requires the cancellation of the surcharges under investigation, including the proposed schedules, on or before September 4, 1953, upon not less than one day's notice, be, and it is hereby, modified so as to postpone the effective date thereof to October 15, 1953, upon one day's notice;

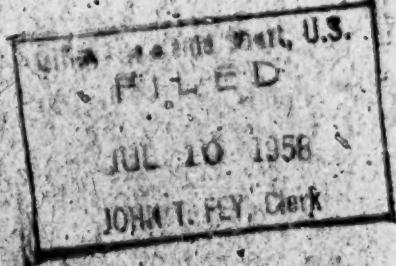
And it is further ordered, That the said petitions, in all other respects, be, and they are hereby, denied for the reason that petitioners have not set forth reasons sufficient to warrant postponement of the effective date beyond October 15, 1953.

By the Commission.

(SEAL)

/s/ GEORGE W. LAIRD
Acting Secretary

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SUPREME COURT, U. S.



No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1958

DAVIDSON TRANSFER & STORAGE COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. 1a-9a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958. The petition for a writ of certiorari was filed on June 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether in a suit by a motor carrier to recover charges allegedly due, which is defended on the

ground that those charges are unreasonable, the court must stay its hand and refer the "reasonableness" question to the Interstate Commerce Commission.

2. Whether, following the post-payment audit of transportation bills, the Comptroller General may recoup overpayments resulting from unreasonable charges by following the procedures set forth in Section 322 of the Transportation Act of 1940.

STATUTES INVOLVED

Section 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. 66, and relevant portions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*, are set forth in the Appendix, *infra*, pp. 15-19.

STATEMENT

This action was brought by petitioner, a motor carrier, against the United States under the Tucker Act, 24 Stat. 505, as amended, 28 U. S. C. 1346 (a) (2), to recover certain sums allegedly due it in connection with the transportation of government property. The Government defended on the ground that the charges sought to be collected were unreasonable. The court below directed the District Court to refer the question of reasonableness to the Interstate Commerce Commission for determination. The relevant facts, which are undisputed, may be summarized as follows:

On or about May 29, 1952, petitioner transported four shipments on Government bills of lading from Poughkeepsie, New York to Bellbluff, Virginia (J. A.

3a-4a). Thereafter, it billed the Government for this transportation on the basis of rates which it then had on file with the Interstate Commerce Commission. These rates included a surcharge which was added to the regular rates assessed on all shipments carried to, from, through, or between points in the State of New York (J. A. 4a). The ostensible purpose of the surcharge was to recoup the cost to motor carriers of a ton-mile truck tax levied by New York for the privilege of operating motor vehicles on its highways.

As required by Section 322 of the Transportation Act of 1940, *infra*, p. 15, petitioner's bills were paid by the Government as rendered, without first being audited by the General Accounting Office (J. A. 4a). Upon the post-payment audit contemplated by Section 322, however, the General Accounting Office disallowed that portion of the payments which represented the surcharge. The basis of this disallowance was that on July 20, 1953, following an investigation which had been initiated in 1951, the Interstate Commerce Commission had determined the surcharge to be unjust and unreasonable, and had ordered petitioner and other motor carriers to cancel that portion of their filed rates which reflected it. *Surcharges, New York State*, 62 M. C. C. 117.

¹ Petitioner's tariff, including the New York surcharge, was filed on October 8, 1951; its operation was suspended for the maximum period allowed by statute pending inquiry by the Commission, but it went into effect on May 8, 1952 before the Commission's investigation was completed (62 M. C. C. 117).

Under protest, petitioner refunded the disallowed portion of the payments (totaling \$18.34) (J. A. 4a). It then instituted this suit to recover the refund (J. A. 3a-6a). A number of other carriers with similar claims were permitted to intervene. Both petitioner and the Government filed motions for summary judgment (J. A. 7a-8a), and the District Court, without opinion, granted petitioner's motion and denied that of the Government (J. A. 9a).

On appeal, the Court of Appeals reversed, holding that the United States could defend against petitioner's claim on the ground that the surcharge was unreasonable. It pointed to the common law right of a shipper by motor carrier to be free from the exaction of an unreasonable rate, and held that the common law remedy for enforcement of this right was expressly preserved by the savings clause in Section 216 (j) of the Interstate Commerce Act (49 U. S. C. 316 (j)). Concluding that it was not clear from the *Surcharges, New York State* case, *supra*, whether the Commission regarded the surcharge as having been unreasonable when the shipments here involved were made, the Court of Appeals remanded to the District Court with instructions to refer that question to the Commission as a matter within its primary jurisdiction (Pet. App. 1a-9a).

ARGUMENT

The Court of Appeals' holding—that the Government was entitled to interpose its defense of unreasonableness and to have that defense referred to the Interstate Commerce Commission as a matter within

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its primary jurisdiction—conforms to the decisions of this Court and is clearly correct.

Petitioner's contention that Part II of the Interstate Commerce Act permits a motor carrier to recover charges declared unlawful by the statute itself has been uniformly rejected by every court that has passed upon it. It has also been rejected, on at least nine occasions, by the Interstate Commerce Commission. Furthermore, it cannot be reconciled with *United States v. Western Pacific R. Co.*, 352 U. S. 59. Petitioner's alternative contention that Section 322 of the Transportation Act of 1940 does not authorize the Comptroller General to recoup payments resulting from unreasonable charges has been implicitly rejected by this Court and is equally without merit.

1. In urging that it was entitled to recover the surcharge even if it constituted an unreasonable charge at the time the shipments here involved were made, petitioner relies principally on the fact that Part II of the Interstate Commerce Act does not empower the Commission to entertain independent reparations proceedings where a motor carrier is involved. Recognizing, perforce, that Section 216 (d) of that Part in terms imposes a duty on motor carriers to assess "just and reasonable" charges and goes on to provide that, "every unjust and unreasonable charge * * * is prohibited and declared to be unlawful", petitioner nevertheless reasons from the Commission's lack of authority to award affirmative relief that Part II was intended both (1) to deprive shippers of all effective protection against the exaction of an unlawful charge,

and (2) to enable motor carriers to invoke the jurisdiction of a federal court to recover such a charge.

Petitioner cannot point to anything in the legislative history of Part II to support its effort to ascribe to Congress the anomalous intent of permitting motor carriers to benefit, with judicial assistance, from conduct which the governing statute proscribes. As the courts have recognized, the existence or nonexistence of Commission authority to award reparations does not determine either (1) the Commission's power to entertain "reasonableness" questions which are raised by way of defense in a judicial proceeding instituted by a motor carrier, or (2) the court's duty, in its disposition of that defense, to seek the Commission's determination (if not already made) under the primary jurisdiction rule enunciated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. See, e. g., *United States v. T. I. M. E., Inc.*, 252 F. 2d 178 (C. A. 5), petition for a writ of certiorari pending, No. 68, this Term; *New York & New Brunswick Auto Express Co. v. United States*, 126 F. Supp. 215 (C. Cls.); *United States v. Garner*, 134 F. Supp. 16 (E. D. N. C.).

These uniform holdings rest on the considerations discussed at length in *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M. C. C. 337. In that case, decided in 1944, the full Interstate Commerce Commission undertook "a thorough reexamination" of the numerous prior decisions of its divisions² holding

² See e. g., *Kingan & Co. v. Olson Transportation Co.*, 32 M. C. C. 10; *W. A. Barrows Porcelain Enamel Co. v. Cushman M. Delivery*, 11 M. C. C. 365, 367; *Hausman Steel Co. v. Sea-*

that the agency has authority to "make an administrative determination of the lawfulness of rates charged on past shipments" for the benefit of shippers, carriers, and the courts which must resolve their disputes. On the basis of that re-examination, the Commission concluded that those decisions were correct.

As the Commission noted, Part II contains much more than a precatory declaration of a congressional policy that motor carriers—like rail carriers—are to charge just and reasonable rates. The statute confers broad powers on the Commission to insure that the statutory mandate is carried out. For example, Section 204 (e), which has no precise counterpart in Part I, provides that the Commission may investigate, either upon complaint or its own initiative, whether there has been a violation of any requirements of the statute. If the investigation discloses a failure of compliance, the Commission is to issue an appropriate order to compel the motor carrier to comply.

Additionally, Congress expressly preserved in Section 216 (j) all remedies or rights of action "not inconsistent" with the other provisions of the Act. At common law, "where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same

board Freight Lines, Inc., 32 M. C. C. 31; *Dixie Mercerizing Co. v. ET and WNC Motor Transp. Co.*, 21 M. C. C. 491, affirmed on reconsideration, 41 M. C. C. 355; *Koppers Co. v. Langer Transport Corp.*, 12 M. C. C. 741; *Hill-Clarke Machinery Co. v. Webber Cartage Line, Inc.*, 26 M. C. C. 144; *Patten Blinn Lbr. Co. v. Southern Arizona Freight Lines*, 31 M. C. C. 716.

is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge". *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436. As the Commission pointed out, there is nothing inconsistent between the survival of this common law remedy and the provisions of Part II, provided that, in the interest of uniformity, the issue of reasonableness is resolved in the first instance by the Commission. Indeed, Section 216 (d) represents a codification, for the purpose of federal regulation, of the common law rule.³

This analysis is supported by *United States v. Western Pacific R. Co.*, 352 U. S. 59. Indeed, under this Court's holding in that case, the reference ordered by the court below (and by the Fifth Circuit in *United States v. T. I. M. E., Inc., supra*) would have been mandatory even if the shipper's common law

³ *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; discussed by petitioner (Pet. 13-15), is not to the contrary. It is true that "the Court said the case should be dismissed, but preoccupation was with the necessity for prior administrative determination, not with whether there was jurisdiction in the sense of power to hold the case until there had been a Commission determination". (Frankfurter, J., dissenting in *United States v. I. C. C.*, 337 U. S. 426, 464).

The language in *United States v. I. C. C.*, quoted by petitioner (Pet. 15), similarly is inapposite. It well may be that a shipper cannot file a proceeding in a district court under Section 9 of the Interstate Commerce Act, 49 U. S. C. 9, where his claim is one of unreasonableness necessitating the exercise of the Commission's primary jurisdiction. But that hardly has any bearing upon the shipper's right, in a suit brought by the carrier, to interpose a defense of unreasonableness and to have that defense referred to the Commission. *United States v. Western Pacific*, discussed *infra*, dispels all doubt on that score.

remedy had not survived the enactment of Part II of the Interstate Commerce Act.

In *Western Pacific*, three rail carriers sued the United States under the Tucker Act to recover charges allegedly due them for the transportation of containers filled with napalm gel. These charges had been computed at the rate specified for "incendiary bombs". The Government defended on the ground that, as a matter of tariff construction, the lower rate specified for gasoline in steel drums applied, and, alternatively, that if the higher rate governed, it was unreasonable as applied. Granting summary judgment to the carriers, the Court of Claims resolved the tariff construction question adversely to the Government and concluded that a reference to the Commission of the issue of reasonableness was barred because the two-year limitation on the Government's right to seek affirmative relief from that body had expired.

In reversing, this Court held that the absence of authority in the Commission to award affirmative relief to the Government did not abrogate the Government's right to interpose the defense of unreasonableness or affect the duty of the court to refer to the Commission the administrative question raised by that defense [352 U. S. at 71-74]:

We may assume, without deciding, that the Government would have been barred by § 16 (3) from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Com-

mission of questions raised by way of defense in suits which are themselves timely brought. * * *

It is argued that this Court has construed § 16 (3) as "jurisdictional" and that the Commission is therefore barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions come to the Commission by way of referral or in an original suit. Reliance is placed upon *A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662; *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633; *Midstate Co. v. Pennsylvania R. Co.*, 320 U. S. 356. But these cases all dealt with affirmative claims for the recovery of transportation charges, and not with referrals incident to suits which were originally brought in time. The teaching of the *Midstate* case, for instance, is that the running of the statute destroys the right to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties. But here the Government is not asserting a right to affirmative recovery. It is seeking only to have adjudicated questions raised by way of defense. It is therefore irrelevant whether the statute of limitations is "jurisdictional" or not; the question would still remain whether Congress intended it to apply to referrals as well as to affirmative suits. * * *

We hold, therefore, that the limitation of § 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's

primary jurisdiction, as were these questions relating to the applicable tariff. [Emphasis added.]

Petitioner's reliance on *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, is misplaced. As observed by the court below (Pet. App. 8a), by the Fifth Circuit in *United States v. T. I. M. E., Inc., supra*, 252 F. 2d at 181, and by the Interstate Commerce Commission in a recent decision reaffirming *Bell Potato Chip*,¹ the issue in the *Montana-Dakota* case was quite different from that presented here. And nothing in that decision supports petitioner's theory that, notwithstanding the teachings of the later *Western Pacific* case, a reference to the Commission is precluded by the fact that the Commission could not award affirmative relief to the Government were an independent proceeding brought for that purpose.

Montana-Dakota was a suit in a federal court by one public utility electric company against another to recover past exactions of allegedly unreasonable charges. Since there was no diversity of citizenship between the parties, and thus jurisdiction in the district court would have been lacking had the suit been brought to enforce an asserted common law right, the plaintiff, of necessity, alleged that a right of action had been created by the Federal Power Act itself. This Court held that the declaration in that Act that unreasonable rates are unlawful did not create an enforceable right to recover unreasonable charges.

¹ *United States v. Davidson Transfer & Storage Co., Inc.*, 302 F. 2d 87.

On the basis of this holding, the Court determined that the plaintiff had not stated a cause of action cognizable in a federal court, and that, therefore, there was no occasion for a reference to the Federal Power Commission. At the same time, the Court noted its prior holdings that where a federally cognizable cause of action has been stated the district court must stay its hand pending reference of subsidiary administrative questions to the appropriate administrative tribunal. See *Smith v. Hoboken R. Co.*, 328 U. S. 123; *Thompson v. Texas Mexican R. Co.*, 328 U. S. 134; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422.

In the instant case, the District Court had a federally cognizable cause of action before it to which the "reasonableness" question raised by the Government's defense was subsidiary. Moreover, even if this action had been instituted by the Government to recover an unreasonable motor carrier charge, *Montana-Dakota*, would not have barred a reference. Since the jurisdiction of the District Court could have been invoked under 28 U. S. C. 1345, the Government would not have been required to rely on Part II of the Interstate Commerce Act as the source of a federally cognizable cause of action. Rather, it could have invoked its common law remedy, which, as observed above, has been preserved.⁵

⁵ Petitioner's argument (Pet. 14) that constitutional considerations would bar the Government from invoking its common law remedy is footless. In the first place, contrary to its apparent belief, the rights of the United States in its contracts for goods and services are governed by general common law principles as interpreted by the federal courts, not

2. There is no merit to petitioner's contention that the General Accounting Office lacks authority to recoup payments to common carriers on the basis that they reflected unreasonable charges. Section 322 of the Transportation Act of 1940, *infra*, p. 15, explicitly reserves to the United States the right to deduct the amount of any overpayment to any carrier from any amount subsequently found to be due the carrier.

To avoid the effect of Section 322, petitioner argues that the term "overpayment" in that Section should be deemed synonymous with the term "overcharge", which is defined in Section 204a (5) of the Interstate Commerce Act (49 U. S. C. 304a (5)), *infra*, p. 16, as an amount in excess of the filed rate. There is nothing whatever in the legislative history of Section 322 to support this suggestion. Moreover, the definition of "overcharge" in Section 204a is in terms limited to matters arising under that Section.

Finally, petitioner's contention ignores the basic purpose of Section 322. As this Court stated in

by the law of any particular state. *Clearfield Trust Co. v. United States*, 318 U. S. 363; *United States v. Allegheny County*, 322 U. S. 174; *United States v. Standard Oil Co.*, 332 U. S. 301. Cf. *Bank of America v. Parnell*, 352 U. S. 29. Secondly, the existence of a state common law remedy for tortious exaction of unreasonable charges for interstate carriage of goods is no more "regulation" of interstate commerce than is the existence of a state remedy against an interstate motor carrier who tortiously runs down a pedestrian. State remedies which affect interstate commerce are invalid only where they conflict with federal regulation or substantially burden interstate commerce. Cf. *Collins v. American Buslines, Inc.*, 350 U. S. 528. Here, of course, no conflict is possible since the issue of reasonableness is to be resolved by the Interstate Commerce Commission.

United States v. New York, New Haven & Hartford R. Co., 355 U. S. 253, Section 322 conferred the benefit of prompt payment upon the carrier, but preserved all of the Government's rights to protect the public treasury against unlawful payments to contractual claimants. There can be no question that, prior to 1940, the Comptroller General could have withheld payment of a transportation bill in circumstances where he concluded that the charges encompassed in that bill violated the Interstate Commerce Act's prohibition against unjust and unreasonable rates.⁶ See also *United States v. Western Pacific R. Co.*, *supra*, 352 U. S. at 74.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1958

⁶ It can hardly be contended that the Comptroller General acts arbitrarily when the disallowances of the charges are based upon determinations of the Interstate Commerce Commission.

APPENDIX

1. Section 322 of the Transportation Act of 1940, September 18, 1940, c. 722, 54 Stat. 955, 49 U. S. C. 66, provides:

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

2. The relevant provisions of Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, are as follows:

GENERAL DUTIES AND POWERS OF THE COMMISSION

See: 204. [49 U. S. C. 304]

(a) It shall be the duty of the Commission—

* * * * *

(b) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

* * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may in-

vestigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * *

ACTIONS FOR RECOVERY OF CHARGES; LIMITATION OF ACTIONS

Sec. 204a. (5)—[49 U. S. C. 304a (5)]

The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

* * * * *

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

Sec. 216. [49 U. S. C. 316]

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering

property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable

prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common

carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatsoever.

* * * * *

(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

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SUPREME COURT. U. S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY, INC.
Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On a Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONER

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IN THE
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No. 96

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UNITED STATES OF AMERICA

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On a Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It appears at p. 10 *et seq.* of the Record herein. The United States District Court for the District of Columbia, in which court this cause originated, wrote no opinion. Its final order appears at page 8 of the Record herein.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958. (R. 17). The petition for a writ

of certiorari was filed on June 11, 1958 and was granted on October 13, 1958. (R. 18). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Does a shipper of property from one State to another by common carrier by motor have a legal right to recover back, by self-help or otherwise, any part of transportation charges paid on the basis of published rates filed with the Interstate Commerce Commission, effective at the time the transportation service was rendered and applicable to it, on the ground that the rates were unreasonable?
2. The Transportation Act of 1940 authorizes the General Accounting Office, upon audit after payment of bills for transportation rendered to the United States by common carriers subject to the Interstate Commerce Act or the Civil Aeronautics Act to deduct the amount of any overpayment to any such carrier from amounts subsequently due such carrier. Does this authority permit the General Accounting Office to make deductions on the ground that in its opinion published rates filed with the Interstate Commerce Commission, effective at the time the transportation service was rendered, and applicable to it were unreasonable?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 Stat. 558, 49 U.S.C. 316(e)(g) and (j), 63 Stat. 280, 49 U.S.C. 304a(5), 41 Stat. 486, 49 U.S.C. 45(7), 54 Stat. 913, 49 U.S.C. 16(3)) and of

the Transportation Act of 1940 (54 Stat. 955, 49 U.S.C. 66) are set forth in Appendix A hereto, *infra*, p. 1a.*

STATEMENT OF THE CASE

Davidson is a common carrier by motor certificated to operate in interstate commerce by the Interstate Commerce Commission. At various times prior to July 20, 1953, it rendered transportation service to the United States, moving property of the United States in interstate commerce to, from, through or between points in the State of New York. Davidson presented bills for its freight charges to the United States and they were paid. The charges were properly computed at the applicable and effective rates filed with the Interstate Commerce Commission in compliance with Section 217(a) of Part II of the Interstate Commerce Act. Included as part of these filed, applicable and effective rates was what was known as the New York State Surcharge. This was a charge over and above the base rates on all movements to, from, through or between points in the State of New York. Its purpose was to recoup the cost to common carriers by motor of a ton-mile truck tax levied by the State of New York for the privilege of operating motor vehicles on the highways of the State, whether in intrastate or interstate commerce.

* Part I of the Interstate Commerce Act deals with rail carriers. It comprises Sections 1 through 27, which are also Sections 1 through 27 of Title 49 of the U. S. Code. Part II of the Interstate Commerce Act deals with motor carriers. It comprises Sections 201 through 227, which are Sections 301 through 327 of Title 49 of the U. S. Code. References to Part II throughout this Brief will be to the Sections as numbered in that Part and not as numbered in the Code.

On July 20, 1953, after Davidson had rendered the United States the transportation service in question, the Interstate Commerce Commission, exercising its authority under Section 216(g) of Part II of the Interstate Commerce Act, found the Surcharge to be unjust and unreasonable and issued an order requiring Davidson and others to cancel it on or before September 4, 1953. The opinion is reported in 62 M.C.C. 117. The Order is reproduced herein as Appendix B, *infra*, p. 7a. Subsequently, on August 21, 1953, the Commission issued a second order postponing the date for cancellation of the Surcharge to October 15, 1953, on which date it was cancelled. The Order is reproduced herein as Appendix C, *infra*, p. 9a.

Thereafter the General Accounting Office of the United States, on post audit of Davidson's freight bills for the transportation service rendered the United States while the New York State Surcharge was in effect, demanded that Davidson refund to the United States the portion of its freight charges that were based on the surcharge. Davidson made refund under protest and, on February 15, 1955, brought suit for breach of contract to recover back in the United States District Court for the District of Columbia under the Tucker Act, 28 U.S.C. Sec. 1346(a)(2). There being no issue of fact joined by the complaint and answer, cross motions for summary judgment were made and, on June 10, 1957, the District Court entered an order granting Davidson's motion for summary judgment and denying the cross motion of the United States. (R. 8).

On August 7, 1957, the United States filed a notice of appeal to the United States Court of Appeals for

the District of Columbia Circuit. The case was briefed and argued to Associate Judges Prettyman, Bazelon and Bastian. Judge Bazelon thereafter disqualified himself under Section 455 of the Judicial Code, 28 U.S.C. Sec. 455. On April 24, 1958 the Court issued its opinion by Judge Prettyman, Judge Bastian concurring, and entered judgment reversing the order of the District Court and remanding the cause to it "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective." (R. 17).

SUMMARY OF ARGUMENT

Question 1

The *Montana-Dakota* Case, 341 U.S. 246, held that a buyer of electricity at rates regulated by the Federal Power Commission under the Federal Power Act has no justiciable legal right to any rate other than the rate filed with the Commission and effective at the time the service is rendered. The basis of the holding is that no court can determine whether or not filed rates are unreasonable and the Congress gave the Commission only legislative authority to review existing rates and, if it finds them unreasonable, to prescribe new rates for the future. For a court to retain a suit to recover allegedly unreasonable rates on its docket while it referred the issue of reasonableness to the Commission would be to permit the Commission to do indirectly what the Congress forbids it to do directly.

The *Montana* Case controls here. The authority of the Interstate Commerce Commission over the rates of motor carriers under Part II of the Interstate Commerce Act is, like the authority of the Federal Power Commission under the Federal Power Act, limited to

the fixing of rates for the future. Indeed, the Interstate Commerce Commission does not even have the limited power given the Federal Power Commission to require the refund of amounts collected under newly-changed rates that have been suspended and have then taken effect while proceedings which result in a finding that they are unreasonable are in progress.

The *Montana* Case cannot be distinguished on the theory that it merely held that a complaint for reparations for unreasonable rates stated no claim under the Federal Power Act and therefore no claim cognizable in a federal court absent diversity of citizenship. The basis of the holding in *Montana* is that there can be no recovery, either under the Act or at common law, because neither any court nor the Commission has power to determine the reasonableness of rates charged in the past.

Whatever common law *rights* shippers had before the Interstate Commerce Act were superseded by it. The *Abilene* Case, 204 U.S. 426, approved in *U.S. v. I.C.C.*, 337 U.S. 426, makes clear that the Act's preservation of common law *remedies* permits shippers to invoke the aid of courts only to enforce rights which have been conferred by the Act and which can be judicially vindicated without resort to the Commission. Moreover, the Interstate Commerce Act could not have preserved a common law right to a reasonable rate for transportation from one state to another because no such right can exist under the United States Constitution. Common law rights are created only by state law and no state can constitutionally fix rates for such transportation, *Wabash Ry. v. Illinois*, 118 U.S. 557. A state cannot do so either prospectively by its legislature or retrospectively by its judiciary.

The declaration in the Interstate Commerce Act that unreasonable rates are unlawful is a statutory criterion for the exercise by the Interstate Commerce Commission of its rate regulatory authority. *Montana, supra*. It does not preserve any justiciable common law rights or create any justiciable statutory rights. The nature and measure of a shipper's rights are found in those sections of the Act which give the Interstate Commerce Commission the power "to reduce the abstract standard of reasonableness to concrete expression in dollars and cents." *Montana*, at p. 251. Under Part II of the Act the Commission's authority so to do is only the legislative authority to prescribe rates for the future. To permit it to prescribe rates for the past would be to permit it to exercise judicial authority that has not been delegated to it.

Part II of the Interstate Commerce Act, enacted in 1935, adopted the rate regulatory methods then and now in vogue. It is based on the assumption that rates which are unreasonable, whether because too high or too low, will be promptly corrected through the exercise of the Commission's authority, upon complaint or *sua sponte*, to grant prospective relief. The result of this regulatory scheme may be, in some cases and for a limited period of time, to permit commerce at rates above or below the "zone of reasonableness." But if this result is to be avoided means of doing so must be devised by the Congress and not improvised by the Courts.

Question 2

The Interstate Commerce Act commands adherence to applicable rates filed with the Interstate Commerce Commission by both shipper and carrier and makes any deviation therefrom a crime. A carrier cannot

refund any portion of charges based on applicable rates unless the Commission, after notice and hearing, finds those rates unreasonable and fixes other rates in lieu of them. On the other hand a carrier may not only voluntarily refund charges in excess of those payable at filed and applicable rates, but can be compelled to do so by a court without resort to the Commission.

Section 321 of the Transportation Act of 1940 requires the United States to pay "full applicable commercial rates" for transportation service rendered it by common carriers subject to the Interstate Commerce Act. Section 322 requires the United States to pay its bills for such transportation upon presentation, but reserves to it the right, on post-audit, to deduct the amount of any overpayment from other amounts due the carrier. The term "overpayment" is the correlative of the term "overcharge." What is an overpayment by the United States is an overcharge by the carrier. It necessarily follows that the General Accounting Office can deduct only for overcharges as defined in the Interstate Commerce Act, namely "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

This Court considered in detail Section 322 of the Transportation Act of 1940 in *U.S. v. N.Y., N.H. & Hartford R.R.*, 78 S. Ct. adv. 212. Throughout its discussion it used the terms "overcharge" and "overpayment" interchangeably. Moreover it made plain that the purpose of the Section was to preserve as against common carriers the substance of the right the United States has always had to require those presenting bills to it to justify the correctness of their charges to the administrative officers of the Government responsible for them.

The Interstate Commerce Act sets forth the standards for determining the reasonableness of rates and confides the function of regulating rates under those standards in the Interstate Commerce Commission exclusively. That Act, together with the Administrative Procedure Act, provides specific procedures for the fixing of rates, all designed to assure full and fair hearings, findings supported by substantial evidence, and the proper exercise of administrative discretion within the standards it lays down. To allow the administrative officers of the Government not only to determine the correctness of charges by carriers, but also to determine the reasonableness of admittedly correct charges would be to vitiate the whole purpose and scheme of rate regulation established by the Congress.

ARGUMENT

A Shipper Has No Right Against Motor Carriers to Reparations for Alleged Unreasonable Rates

The Montana-Dakota Case

The key to the answer to the first question presented is the proper interpretation and the applicability here of the opinion and holding of this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). That was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern in interstate commerce, grounded on its payment of rates that had been filed with the Federal Power Commission under Section 205(c) of the Federal Power Act. The gravamen of the complaint was an alleged violation of the requirement of Section 205(a) of that Act that rates be just and reasonable. The complaint alleged that Northwestern's rates were unreasonably high, that Northwestern had misled the Commission into accept-

ing the rates by failing to comply with its obligations of disclosure under the Act, that the rates had therefore been improperly established, and that, through interlocking directorates, Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect.

This Court held that the complaint failed to state a cause of action and ordered it dismissed. It held that rate reasonableness is not "a justiciable legal right" but rather "a criterion for administrative application in determining a lawful rate." One "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." 341 U.S. at p. 251. In answer to Montana's argument that the District Court could retain the case on its docket and refer to the Federal Power Commission the issue of the reasonableness of the rates, the Court said:

"But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent. 341 U.S. at p. 254.

The four dissenting Justices, speaking through Mr. Justice Frankfurter, agreed, in his words, that:

"Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it

clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a *properly* filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed." 341 U.S. at p. 258. (Emphasis supplied).

Their dissent was bottomed on the allegation in the complaint that the rates complained of were *not properly filed* with the Commission, i.e., were fraudulently filed. Since there is no claim in this case that any of Davidson's rates were improperly filed, the dissenting opinion is irrelevant on the issue here and the majority opinion must be treated as though it were unanimous.

The Montana-Dakota Case Is Not Distinguishable

Does the *Montana-Dakota* Case control here or is there any basis upon which it can be distinguished? Certainly there is no difference between the provisions of the Federal Power Act and the provisions of Part II of the Interstate Commerce Act from which a distinction can be drawn. Part II of the Interstate Commerce Act was enacted on August 9, 1935, 49 Stat. 543, just 17 days before the Federal Power Act was enacted on August 26, 1935, 49 Stat. 838. Both Acts confer regulatory authority on federal commissions by substantively identical provisions couched in substantially the same language.

Both Acts declare unjust and unreasonable rates to be unlawful. Interstate Commerce Act, Section 216(d), Federal Power Act, Section 205 (a). Both give the seller of the service the right initially to estab-

lish rates. Interstate Commerce Act, Section 217(a), Federal Power Act, Section 205(c). Both provide that rates may be changed only by a new filing and thirty days notice. Interstate Commerce Act, Section 217(c), Federal Power Act, Section 205(d). Both provide for hearings concerning the lawfulness of proposed changes and for suspension of such changes for a limited period of time. Interstate Commerce Act, Section 216(g), Federal Power Act, Section 205(e). Both provide for investigation of the reasonableness of existing rates, upon complaint or *sua sponte*, and for the issuance of orders upon such investigation prescribing rates. Interstate Commerce Act, Section 216(e), Federal Power Act, Section 206(a). In both instances this authority is limited to the fixing of rates prospectively. Section 216(e) of the Interstate Commerce Act provides only for the fixing of rates "thereafter to be observed" and for the fixing of practices "thereafter to be made effective." Section 206(a) of the Federal Power Act provides for the fixing of rates and practices "to be thereafter observed and in force."

In view of the foregoing, it cannot logically or consistently be held that the Interstate Commerce Commission has jurisdiction to determine retrospectively the reasonableness of the properly established legal rates of motor carriers and that the Federal Power Commission has no jurisdiction to determine retrospectively the reasonableness of the properly established legal rates of electric public utilities. In the *Montana* Case the entire Bench agreed that the fact that the Congress withheld from the Federal Power Commission the power to grant reparations constituted a denial of any right to any rate other than the duly established legal rate. So too, the withholding from

the Interstate Commerce Commission of the power to grant reparations to shippers by motor carrier constitutes a denial of any right to any rate other than the duly established legal rate.

This conclusion is fortified by the fact that where Congress intended to give the Federal Power Commission and the Interstate Commerce Commission power to fix rates retroactively it did so in clear terms. It did so in Section 205(e) of the Federal Power Act, in Section 4(e) of the Natural Gas Act and in Section 15(7) of Part I of the Interstate Commerce Act, dealing with rail carriers. All of these sections not only provide for the suspension of rate increases for a limited period of time pending investigation of them, but further provide that the Commission may require that account be kept of all amounts collected under the increases after they are made effective, and, upon completion of the investigation, may require, in the words of Section 15(7), "refund with interest, to the persons on whose behalf such amounts were paid, [of] such portion of such increased rates . . . as by its decision shall be found not justified."

Moreover, Section 13 of Part I of the Interstate Commerce Act authorizes the filing of complaints with the Interstate Commerce Commission for awards of reparations against rail carriers grounded on the maintenance of unreasonable rates in the past. Section 15(1) authorizes the Commission to hear such complaints and to prescribe reasonable rates, and Section 16(1) authorizes it to implement its prescription by issuing orders requiring rail carriers to pay reparations. Section 16(3)(b) requires such complaints to be filed with the Commission within two years from the time the cause of action accrues. Section 16(3)(f)

provides for the enforcement of such orders in state or federal courts by the filing of complaints thereon within one year from the date of their issuance.

There are no similar provisions in Part II of the Interstate Commerce Act dealing with motor carriers. Section 216(g) provides for the suspension of rate increases for seven months pending investigation of them, but, in contrast to Section 205(e) of the Federal Power Act, Section 4(e) of the Natural Gas Act and Section 15(7) of Part I of the Interstate Commerce Act, gives the Commission no authority to require that account of amounts collected under the increases be kept or that refund of any portion of them found unjustified be made. There are no provisions in Part II, for the filing of complaints for reparations, or for orders awarding reparations, or for suits to enforce orders prescribing rates.

Where the Congress intended to give the Commission power to deal with the rates of motor carriers retroactively it did so in clear terms. It did so in just one situation. Section 216(f) of Part II of the Act authorizes the Commission, upon complaint of a *carrier* party to a joint rate or upon its own initiative, to fix reasonable divisions of joint rates between the *carriers* party thereto. Where the joint rate has been established pursuant to a finding or order of the Commission, it may require the divisions thereof to be adjusted retroactively to the date of such finding or order. Otherwise it may require adjustment only "from the date of filing the complaint or entry of order of investigation or such other date *subsequent* as the Commission finds justified." (Emphasis supplied). In the face of this the absence of authority to award any reparations to shippers by motor carrier cannot be

laid to Congressional inadvertence. On the contrary such authority was deliberately withheld. Authority so withheld by the Congress cannot be conferred by the Commission or the courts.

**The Erroneous Distinction of the
Montana Case Drawn by the Court
Below and Respondent**

The Court of Appeals and Respondent try to distinguish the *Montana* Case on the ground that there the Plaintiff alleged that it had been charged unreasonable rates, while here the Defendant alleges that it was charged unreasonable rates. They point out that this Court held that Plaintiff Montana had no justiciable right under the Federal Power Act to a rate other than the rate filed with the Federal Power Commission, that therefore its claim that the filed rate was unreasonable failed to state a federally cognizable cause of action, and that therefore its complaint had to be dismissed. But, they say, in this case Plaintiff Davidson's claim that the United States breached its contract of carriage did state a federally cognizable cause of action, that therefore its complaint could not be dismissed as was Montana's complaint, and that therefore the District Court was bound to consider the defense that the rates Davidson seeks to recover were unreasonable.

The fallacy in this is that it assumes the answer to the question. Under the Interstate Commerce Act, does a shipper by common carrier by motor have a justiciable legal right to a reasonable rate? We think we have shown that he has not. If not, if, in the words of this Court in the *Montana* Case, the shipper "can claim no rate as a legal right that is other than the filed rate", his claim that the filed rate was unreason-

able is insufficient in law. If it is insufficient in law it makes no difference whether the shipper pleads it as plaintiff or defendant, whether it be pleaded in complaint or in answer. Under the Federal Rules of Civil Procedure a complaint that is insufficient in law must be dismissed, Rule 12, and an answer that is insufficient in law gives the defendant a right to summary judgment. Rule 56.

United States v. Western Pacific R., 352 U.S. 59, upon which Respondent primarily relies, is thus clearly inapposite. In that case the United States pleaded as a defense to a suit by rail carriers for their charges that the rates were inapplicable, because, *inter alia*, they were unreasonable. As we have seen, Part I of the Interstate Commerce Act concededly grants a substantive legal right to a reasonable rate *even though different than the filed rate*. Nevertheless, the Court of Claims overruled the defense on the ground that the two year statute of limitations on complaints to the Interstate Commerce Commission for reparations in Section 16(3) of the Act barred complaints by the United States as well as complaints by private shippers, that the time had run, and that therefore both the Commission and the courts were barred from granting the United States affirmative relief, i.e., reparations. This Court assumed without deciding that affirmative relief would be barred by limitations. However, it held that Section 16(3) did not bar the United States from pleading defenses that were *legally sufficient as a matter of substantive law* to a suit by carriers to recover charges. It further held that it did not bar the referral to the Commission of issues raised in those defenses which the Interstate Commerce Act *gave the Commission jurisdiction to resolve* and which were within its special competence. This holding that

a statute of limitations bars affirmative relief in vindication of concededly existing substantive legal rights, but does not bar defenses based on those same substantive legal rights, cannot support a holding that whether or not there is a substantive legal right depends on whether the one claiming it is plaintiff or defendant.

The basic fallacy in the position of the Court of Appeals and Respondent springs from their failure to grasp the basis of the holding of the *Montana* case. They treat the holding as purely procedural, i.e., as merely delimiting the types of causes of action that a federal court can entertain on their merits. The *Montana* Case of course does this. It holds that a complaint alleging that a fraudulently filed rate was unreasonable does not state a cause of action that a federal court can entertain on its merits. But this holding is not grounded on the fact that federal courts are courts of limited jurisdiction. Indeed, the Court took pains to point out that since the complaint alleged the violation of a federal right the District Court had jurisdiction of the cause and that its dismissal for want of jurisdiction was erroneous.

This Court's holding in the *Montana* Case is grounded squarely on the fact that a purchaser of electricity in interstate commerce has no legal right justiciable in any court to any rate other than the rate filed with the Federal Power Commission, whether the filing was fraudulent or not. It follows that the suit would have been dismissed even had there been diversity of citizenship. It also follows that it would have been dismissed had it been brought as a common law action for fraud in a state court.

The foregoing is easily demonstrated. As this Court said in *Montana*, 341 U.S. at p. 252: "Before the [Federal Power] Act [Montana] would have had no statutory right to a reasonable rate, but it did have a common law right not to be defrauded into paying an unreasonable one." 341 U.S. at p. 252. However, it went on, the acts charged by Montana "do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remedial fraud." 341 U.S. at p. 253. But, said this Court, the Federal Power Act gave the Federal Power Commission the exclusive power to fix reasonable rates. At the same time it deliberately withheld from it the power to award reparations or to determine rates retrospectively. The necessary consequence was the abrogation of Montana's common law action. The suggested alternative, reference of the issue of reasonableness to the Commission, was rejected on the ground that it would subvert the statutory scheme by permitting Montana "indirectly to obtain Commission action which Congress did not allow to be taken directly." 341 U.S. at p. 254.

The dissenting Justices did not quarrel with this holding as applied to "properly" filed rates. They agreed that as to such rates there could be no recovery in damages on the ground that they were unreasonable, under either the Federal Power Act or the common law. "The statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief." 341 U.S. at p. 263.

**The Erroneous Theory of the Court
Below and Respondent as to the Nature
of the Shipper's Right**

As we have seen, and as the Court of Appeals here held, Part II of the Interstate Commerce Act, like the Federal Power Act, but in sharp contrast to Part I of the Interstate Commerce Act, confines the rate regulatory authority of the Interstate Commerce Commission to the fixing of rates prospectively. The theory of the Court below was that since Section 216(d) of Part II of the Interstate Commerce Act declares unjust and unreasonable rates to be unlawful and since the Act did not in terms extinguish the common law right to reasonable rates for past services, "the right itself survived" and the common law remedy survived. (R. 15). This cannot be so.

The common law right to damages for the charging of unreasonable rates in the past was a right to the difference between the reasonable rate and the unreasonable rate. Concededly, under the doctrine of *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 527, 27 S. Ct. 350, no court can determine what this difference is. And as the Court below itself said, Part II of the Interstate Commerce Act failed to give the Interstate Commerce Commission authority to do so, that is, it "failed to provide an administrative forum for adjudication of the damages." (R. 15). Instead, it limited the Commission to the fixing of rates prospectively. It follows that both the common law right and the common law remedy were abrogated, and that the only judicially cognizable right remaining is that given by the Act, namely, as *Montana* put it, the right to "the filed rate, whether fixed or merely accepted by the Commission."

The Court of Appeals relied on the fact that Section 216(j) of Part II of the Interstate Commerce Act provides that common law remedies "not inconsistent" with the rate regulatory provisions of Section 216 survive its passage. The answer to this is found in the *Abilene* Case, *supra*, 27 S. Ct. at p. 356. That was a common law suit in a state court by a shipper against a rail carrier alleging that an excessive and therefore unreasonable rate had been charged. The shipper argued that the suit was maintainable because Section 22 of the Interstate Commerce Act provides, *inter alia*, that: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies". The breadth of this savings clause is in sharp contrast with the narrowness of the savings clause in Section 216(j). Nevertheless this Court held that the suit would not lie, saying:

"... we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of." 27 S. Ct. at p. 356.

Dealing specifically with the savings clause, this Court said:

"This clause, however, cannot in reason be construed as continuing in shippers a common-law

right, the continued existence of which would be absolutely inconsistent with the provisions of the act." 27 S. Ct. at p. 358.

The *Abilene* holding was specifically affirmed, if not enlarged, as recently as 1949. In *United States v. Interstate Commerce Commission*, 337 U.S. 426, 437, this Court rejected the Commission's argument that a shipper by rail could vindicate his right to reparations specifically granted by Part I of the Act in a federal district court. It did so notwithstanding that Section 9 gives a shipper by rail alternative remedies, either complaint to the Commission under Section 13 or suit in a federal court. The Court held that "it has been established doctrine since this Court's holding in [the *Abilene* Case] that a shipper *cannot file* a Sec. 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for the exercise of the Commission's primary jurisdiction." (Emphasis supplied). Since a cause of action to enforce a right to reparations specifically granted by Part I will not lie, *a fortiori* a common law cause of action to enforce a right to reparations deliberately withheld by Part II will not lie.

A Common Law Right Is Unconstitutional

There is another conclusive reason why there can be no common law right against motor carriers for alleged unreasonable past rates on interstate movements. Common law rights exist only by the force of state law. There is no federal common law. Moreover, the federal courts are bound by the state courts in the construction and application of the common law of a state. *Erie R. R. v. Tompkins*, 304 U.S. 64. No state

has constitutional power to regulate the rates charged by common carriers for transportation from one state to another. *Wabash Ry. v. Illinois*, 118 U.S. 557. It follows that a cause of action for damages for unreasonable rates charged for such transportation would not lie under the common law of any state. A state no more has constitutional power to regulate rates retrospectively through its judiciary than it has to regulate them prospectively through its legislature.

It is no answer to say that the regulation of the rates would as a practical matter be the same as that which the Interstate Commerce Commission would impose had it authority to do so, because its determination of reasonableness would be sought and accepted by the Court. The facts would remain that (1) the creation of the right and the grant of the remedy would be an exercise of unconstitutional power by the state whose common law was invoked, and (2) the court in which suit was brought would enter a judgment based upon a *quasi-judicial* determination by the Commission that it has no authority to make under the power delegated to it by the Congress. Cf. *Montana-Dakota, supra*, and *Hope Natural Gas Co. v. F.P.C.*, 134 F. 2d 287, 310 (C.A. 4th 1943), holding that the Federal Power Commission, having only *quasi-legislative* power, has no power to award reparations under the Natural Gas Act and therefore "certainly no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions."

Respondent tries to brush this argument off in a footnote to its Brief in opposition to certiorari. (P. 12, fn. 5): It says that the rights of the United States "in its contracts for goods and services are governed

by general common law principles as interpreted by the federal courts, not by the law of any particular state." Assuming this to be true here, the question before this Court is not merely the rights of the United States in its capacity as a shipper by motor carrier, but the rights of private shippers as well.

Respondent also says that "the existence of a state common law remedy for tortious exaction of unreasonable charges for interstate carriage of goods is no more 'regulation' of interstate commerce than is the existence of a state remedy against an interstate motor carrier who tortiously runs down a pedestrian." The analogy is obviously false. The question here is not whether the state can afford a remedy for the invasion of an existing legal right. The question is whether a state can create a legal right, i.e., a right to a particular rate for transportation from one state to another. It has long since been settled that it cannot. Since it cannot it makes no difference that it avoids conflict with federal regulation of rates for such transportation by seeking the guidance of the Interstate Commerce Commission in determining the particular rate it will fix.

The Congressional Declaration That Unreasonable Rates Are Unlawful

Both the Court of Appeals and Respondent rely on the fact that both Section 1(5) of Part I and Section 216(d) of Part II of the Interstate Commerce Act declare that unjust and unreasonable rates are unlawful. This declaration neither preserves any justiciable common law rights nor creates any justiciable statutory rights. Rather, as *Montana* held, it is a "criterion for administrative application in determining a lawful rate." 341 U.S. at p. 251. The *Abilene*

Case makes clear that the Act superseded whatever common law right to reparations a shipper may have had, and substituted therefor rights that it created. "The Act altered the common law by lodging in the Commission the power theretofore exercised by the courts, of determining the reasonableness of a published rate." *Arizona Grocery Co. v. Atchison, Topeka & S.F. Ry.*, 284, U.S. 370, 384. Obviously the measure of those rights must be found in those provisions of the Act which give the Interstate Commerce Commission authority to "reduce the abstract concept of reasonableness to concrete expression in dollars and cents." *Montana, supra*, at p. 251.

Under Part I as originally enacted in 1887 this authority over rail rates was judicial only, that is it was limited to determining the reasonableness of rates in the past.

"Under the act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged [citations] or to set a maximum rate for the future [citations] for the reason that to do so would be to exercise a legislative function not delegated to that body by statute." *Arizona, supra*, at p. 385. (Emphasis supplied).

Subsequently Part I was amended to give the Commission the power "to speak as the Legislature" in prescribing rates for the future, as well as to speak as a Court by prescribing rates for the past. *Arizona, supra*, at p. 386.

In contrast Part II, enacted in 1935 and reflecting regulatory methods then and now in vogue, conferred *only* legislative authority to fix rates for the future. As *Arizona* would put it, under Part II the Commission is without power to fix rates for the past "for the

reason that to do so would be to exercise a [judicial] function not delegated to that body by statute." It, like the Federal Power Act enacted simultaneously and the Natural Gas Act and the Civil Aeronautics Act enacted in 1938, is "based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief." Mr. Justice Frankfurter in *Montana*, 341 U.S. at p. 263.

The inevitable effect of the regulatory scheme of these statutes may be in some cases and for a limited period of time to permit commerce at a rate above or below the "zone of reasonableness." Respondent claims that the rates in issue here were above that zone. *Hope Natural Gas Co. v. F. P. C.*, 196 F. 2d 803 (C.A. 4th 1952), is one in which the rates in issue were below that zone. There the Federal Power Commission suspended all of a rate increase for natural gas filed by Hope for the maximum period of five months provided by Section 4(e) of the Natural Gas Act, and simultaneously entered into a hearing respecting its lawfulness. At the conclusion of the hearing the Commission found a part of the increase to be justified and disallowed the remainder. Hope then petitioned the Commission to make the increase actually allowed effective retroactively through the period of suspension. The Commission denied the petition and the Court of Appeals affirmed its action.

In its opinion the Court pointed out that the "Commission is given no power to enter reparation orders with respect to rates. Its power over rates, which is prescribed by Section 5(a)[of the Natural Gas Act] is to determine after a hearing whether existing rates are [unlawful] and, if so, to prescribe the just and

reasonable rate 'to be thereafter observed and in force'. If it suspends a proposed new rate under Section 4(e) and enters upon a hearing pursuant to that Section, it can make only such orders with respect thereto 'as would be proper in a proceeding initiated after it had become effective', i.e., a proceeding under section 5(a)." The Court further pointed out that there "is nothing in section 4(e) of the Act which lends support to the contention that upon a determination made thereunder the rates so determined may be given effect through the suspension period. If Congress had so intended it would have been easy enough to have said so." 196 F. 2d at p. 805.

Hope argued that to fail to make the admittedly reasonable increase effective retroactively throughout the period of suspension was to enforce unreasonably low rates against it. The Court gave two answers. First, referring to the fact that "the suspension provision of the [Natural Gas Act] here under interpretation was taken bodily from the Interstate Commerce Act," the Court noted that under the latter Act it had never been the rule "that increased rates allowed after a period of suspension could be made retroactive during that period." Second, it reasoned that with changes in economic conditions rates must be changed from time to time and that "the lag which necessarily accompanies changes may result to the benefit of the utility as well as to its detriment. . . . Rate making is not an exact science and losses of one period must be counterbalanced against gains of another in any fair consideration of the reasonableness of the rate making procedure." 196 F. 2d at p. 808.

It is readily seen that the *Hope* Case and the case at bar present the same fundamental question, which

requires the same fundamental answer. They differ only in this: In *Hope* the seller of service sought to make a rate increase retroactive. Here the buyer of service seeks to make a rate decrease retroactive. The same regulatory scheme that foiled the seller there foil the buyer here. The only regulatory power either the Natural Gas Act or Part II of the Interstate Commerce Act grants is the legislative power to review existing rates and, if they are found unreasonable, to prescribe new rates for the future. See *United Gas Pipe Line Co. v. Mobile Gas Service Co.*, 350 U.S. 332, 341. Both Acts withhold the power to award reparations. Section 216(e) of the Interstate Commerce Act, like Section 5(a) of the Natural Gas Act, limits the grant of regulatory authority over effective rates to the prescription after hearing of rates "thereafter to be observed." If the Interstate Commerce Commission suspends a newly filed rate under Section 216(g) and enters upon a hearing pursuant to that Section, its power, like that of the Federal Power Commission acting under Section 4(e) of the Natural Gas Act, is limited to making "such order with reference thereto as would be proper in a proceeding instituted after it had become effective." Just as there is nothing in Section 4(e) to support the contention that rate increases may be made retroactive, so there is nothing in Section 216(g) to support the contention that rate decreases may be made retroactive.

The *Hope* Case emphasized that, under the Natural Gas Act, *Hope* could properly be deprived of the benefits of a rate increase for a limited period of time during which it was in fact entitled to it. So too, under the Interstate Commerce Act, the shipper can properly be deprived of the benefits of a rate decrease for a

limited period of time during which it was in fact entitled to it. Let us assume that the instant case is one in which the shipper is so deprived, but at the same time let us note one in which the carrier is so deprived. In *Middle Atlantic Conference v. A.A.A. Trucking Corporation, et al.*, 302 I.C.C. 499, the Interstate Commerce Commission issued an order on December 2, 1957 finding the rates of certain common carriers below the zone of reasonableness and requiring them to increase their rates on January 10, 1958 to minima found reasonable and prescribed in the order. The record on which the Commission acted was closed on July 24, 1957. It can therefore be inferred that the rates prescribed as reasonable minima for use on and after January 10, 1958 were also reasonable minima for use after July 24, 1957, just as the United States here infers that since the New York Surcharge was unreasonable on the date it was cancelled, it was equally unreasonable during the period it was in effect. Assuming the first inference to be fairly drawn, does it follow that a carrier can recover from shippers the minimum rates so prescribed for transportation service rendered between July 24, 1957 and January 10, 1958? The answer is no. Assuming the second inference to be fairly drawn, does it follow that a shipper can recover the Surcharge paid for transportation service rendered while it was in effect? Again, the answer is no. In short, depending on the facts of the case, either the buyer or the seller may suffer from the "regulatory lag." But that result is the necessary consequence of the regulatory scheme the Congress established. If means of avoiding it are desirable they must be devised by the Congress and not improvised by the courts.

**The Cases the Court Below
and Respondent Rely Upon**

All of the judicial decisions actually considering the right of shippers to reparations for unreasonable rates upon which the Court of Appeals and Respondent rely other than the *T.I.M.E.* Case from the Fifth Circuit, which has been consolidated with this case for argument before this Court, deal with the rates of rail carriers. They are therefore plainly inapposite. Nevertheless, since Respondent relies primarily on the *Western Pacific* Case, *supra*, we pause to analyze it further. Railroads sued the United States in the Court of Claims to recover freight charges made for the transportation of aerial bombs without bursters or fuzes. The United States defended on the grounds that the tariff rate applicable to bombs or mines was not applicable to bombs without bursters or fuzes and that, if it were held applicable, it would be unreasonable. The Court of Claims held the tariff rate for bombs applicable. It further held that the question of the reasonableness of the tariff rate was one that only the Interstate Commerce Commission could determine, and that its determination was barred by the two year period of limitations provided by Section 16(3) of Part I of the Interstate Commerce Act. It therefore entered summary judgment for Railroads.

This Court, invoking the primary jurisdiction doctrine, reversed the Court of Claims and directed that the case be referred to the Interstate Commerce Commission for a determination of the reasonableness of the tariff rate for bombs or mines as applied to aerial bombs without bursters or fuzes. The Court pointed out that the distinction between "the issues of tariff

construction and of the reasonableness of the tariff as applied" was artificial in that case because "the Government's thesis on the issue of reasonableness is not that the rate on incendiary bombs is, in general, too high. It argues only that the rate 'as applied' to these particular shipments is too high. . . . This seems to us to be but another way of saying that the wrong tariff was applied." 352 U.S. at p. 68. Since the resolution of this issue "presupposes an 'acquaintance with many intricate facts of transportation'" reference of it to the Interstate Commerce Commission was required. 352 U.S. at p. 66.

In other words, *Western Pacific* held that the construction of the tariffs in issue there for the purpose of determining the applicability of the rates charged required the determination of issues of fact on the basis of evidence extrinsic of the tariff itself; and that only the Interstate Commerce could make that determination in the first instance. True, the issues of fact went to the reasonableness of the rates. But they did not go to the reasonableness of the rates as an independent matter. They did not go to the reasonableness of admittedly applicable rates. On the contrary, they went to the reasonableness of the rates as a factor to be considered in determining whether they were applicable; whether, in the words of the Supreme Court, "the wrong tariff was applied;" whether, in the language of the Interstate Commerce Act, there had been an "overcharge". In short, the Court applied an ancient and fundamental rule of the common law in the construction of written instruments, viz: That resort to parol evidence must be had to resolve latent ambiguities.

The parol evidence that the Court held was to be used was evidence as to the reasonableness of the result of the construction of the tariff urged by Railroads and adopted by the Court of Claims. It is, of course, commonplace for Courts to compare the reasonableness of the result of one construction of a written instrument with the reasonableness of the result of another in resolving ambiguities. For example, as the Government argued in *Western Pacific*, the question of hazard in transportation is "relevant to the question of tariff interpretation, for, like any other instrument, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness." 352 U.S. at p. 69 fn. 10. The *Western Pacific* Case differs only in that, the reasonableness of rates being a matter the Interstate Commerce Commission has exclusive authority to determine the Court must permit it to make the comparison in the first instance.

This is the only rational interpretation of the holding. Part I of the Interstate Commerce Act gives shippers two distinct rights against rail carriers, a right to damages for the exaction of unreasonable rates in the past, Sec. 16(3)(b), and a right to recover "overcharges". Sec. 16(3)(c). The latter are defined to mean "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." Sec. 16(3)(g). It is inconceivable that this Court was ignorant of or presumed to abolish this Congressionally created distinction between damages for the exaction of unreasonable rates and recovery of overcharges, especially since it approved and relied upon *Great Northern Ry.*

v. *Merchants' Elevator Co.*, 259 U.S. 283, in which the distinction is recognized and discussed.

The opinion in the *Western Pacific* Case did not dwell on or spell out the distinction between unreasonable and inapplicable rates. This is entirely understandable since the distinction had no practical significance in that case. The suit being one by a rail carrier, the claim that the rate charged was unreasonable was available to the United States whether its defense was that the rate was applicable but unreasonable, or that the rate was inapplicable because its application would produce an unreasonable result. In fact the United States made both defenses. Consequently, assuming *arguendo* that this Court directed the referral of the issue of the reasonableness of applicable rates to the Commission, it acted properly.

Where, however, as here, we are dealing with the rates of motor carriers, the distinction is of vital importance because, as we have shown, a shipper by motor carrier, in contrast to a shipper by rail, has no justiciable legal right to any rate other than the filed rate and thus has no right to recover damages for the exaction of unreasonable rates in the past. It can challenge reasonableness, if at all, only in support of a claim that the rates it paid were inapplicable because they produced an unreasonable result. Respondent makes no claim that Petitioner's rates in issue here were inapplicable. Indeed, it could not make such a claim. Their applicability to the transportation rendered it is perfectly plain. There is no ambiguity to resolve, latent or patent. There is therefore no basis in law or fact for considering parol evidence, viz: evidence that the application of the rates did produce an unreasonable result.

In sum, the distinction between the *Western Pacific* Case and the case at bar is that a shipper by rail is given by the Interstate Commerce Act a justiciable legal right to reparations for unreasonable rates exacted in the past, which right is enforceable in either Commission or Court. But a shipper by motor carrier has no such right. Its only right respecting filed rates charged in the past is to recover overcharges, i.e., charges in excess of those payable under the applicable tariffs. Sec. 204a(5). If Respondent in this case had answered Petitioner's complaint by denying that the Surcharge was applicable to the transportation service rendered it would have pleaded a defense sufficient in law. The District Court could have either itself construed Davidson's tariffs and determined whether the Surcharge was applicable or, if the construction posed questions within the special competence of the Interstate Commerce Commission, referred the question to it. But the answer having admitted that the Surcharge was applicable, the District Court had no alternative but to give judgment for Petitioner. To hold that the *Western Pacific* Case gives the Interstate Commerce Commission jurisdiction to determine retroactively the reasonableness of the past rates of a motor carrier would be wholly improper. It would be to interpret that case, which prescribed in the light of its own facts the method of adjudicating the merits of legally sufficient defenses to a suit by a rail carrier, as creating justiciable legal rights against a motor carrier that the Congress specifically withheld.

As for the consistent decisions of the Commission upon which the Court below and Respondent rely, their only consistency is in the error of their result. Suffice

it to quote this Court's statement in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, fn. 5, holding erroneous in 1954 an interpretation of the Natural Gas Act that the Federal Power Commission had followed since 1938: "[C]onsistent error is still error."

The General Accounting Office Has No Authority to Deduct From Amounts Due Carriers on the Ground That in Its Opinion Filed and Applicable Rates Are Unreasonable

Basis for Considering the Question

If a shipper has no legal right against a common carrier by motor to any rate other than the filed rate, obviously the General Accounting Office has no authority to deduct charges paid on the basis of a filed and applicable rate from amounts otherwise due common carriers on the ground that the filed rate was unreasonable. In other words, if the first question presented be answered no, the second question will be moot. Therefore, we assume *arguendo* in the discussion that follows that the first question is answered yes.

The Action of the Court Was Error Under the Interstate Commerce Act

The Court of Appeals held that it was not clear from the findings of the Interstate Commerce Commission in *Surcharges—New York State*, 62 M.C.C. 117, whether it "meant to find the surcharge an unreasonable rate during the then-past period when it was in effect." (R. 16) Consequently, although it reversed the judgment for Petitioner for its charges, it did not enter judgment for Respondent. Rather, it remanded the cause to the District Court "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff sur-

charge as a rate during the period when it was filed and effective. Upon receipt of that finding the District Court will proceed to the adjudication of the action before it." (R. 17).

We submit that this action was erroneous. Until the Interstate Commerce Commission finds a rate unreasonable and prescribes another in lieu thereof, a carrier rendering transportation service to which the rate is applicable is entitled, indeed is bound in law, to collect and retain charges based on it. The General Accounting Office therefore unlawfully deducted the surcharge from amounts otherwise due Petitioner and Petitioner is entitled to the judgment the District Court gave it.*

The whole statutory scheme of rate regulation of common carriers under both Part I and Part II of the Interstate Commerce Act makes a distinction between overcharges and charges based upon allegedly unreasonable rates. Thus, Section 217(a) of the Interstate Commerce Act requires the filing of tariffs. Section 217(b) forbids carriers to "charge or demand or collect or receive a greater or less or different compensation" than that specified in the filed tariffs. Section 222(c) subjects to criminal penalties "Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof" who shall "assist, suffer or permit any person . . . natural

*There were actually no deductions in this case. Following its custom, the General Accounting Office made demand on Petitioner for refund of the alleged overpayments, stating that if it were not made within 60 days deductions against other bills would be made. Because deductions complicate its accounting procedures Petitioner, as do many carriers, made refund under protest. This has been uniformly treated by the General Accounting Office, the carriers and the courts as the equivalent in law of deduction.

or artificial, to obtain transportation of . . . property for less than the applicable rate . . .".

The Interstate Commerce Commission has exclusive authority to determine that applicable rates are in fact unreasonable, and shippers are bound to pay applicable rates, whether or not they think them unreasonable, until the Commission, acting after notice and hearing under the Act, (Section 15(1) rail or Section 216(e) motor) finds that such rates are unreasonable and prescribes reasonable rates in lieu of them. *T. & P. Ry. v. Abilene Cotton Oil Company*, 204 U.S. 426 (1907); *Arizona Grocery Company v. Atchison, T. & S. F. Ry.*, 284 U.S. 370 (1932); *Loveless Mfg. Co. v. Roadway Express*, 104 F. Supp. 809 (D.C. Okla. 1952); *Pyramid Nat. Van Lines v. Goetze*, 65 A. 2d 595 (Mun. App. D.C. 1949).

On the other hand, overcharges as defined in the Interstate Commerce Act may be recovered in Court without reference to the Commission. See *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285; *U. S. v. Western Pac. R. Co.*, *supra*, 352 U.S. at p. 69. They may be voluntarily refunded by the carrier. As early as 1910 the Commission held that there "should be no necessity for appealing to governmental authority to award damages for plain overcharges. It is the plain duty of the carriers to collect no more than the published rate; to do otherwise is a crime for which indictment will lie and for which there is serious punishment provided in law against both the carrier and its agent." *National Refrigerator and Butcher Supply Co. v. Illinois Central R.R. Co.*, 20 I.C.C. 64, 65.

In short, a common carrier, in accord with his obligations under the Interstate Commerce Act to abide

his tariffs, is under a duty to refund overcharges upon demand. But, by the same token, he is under a duty to collect and a shipper under a duty to pay charges based on legal, applicable rates, whether or not those tariffs are, or are thought to be, unreasonable, and even though rates other than applicable rates have been charged over a long period of time. *Aetna Plywood & Veneer Co. v. Indianapolis Forwarding Co.*, 52 M.C.C. 591, 594 (1952). To do otherwise is to violate the Interstate Commerce Act. On more than one occasion a carrier has been "admonished that its duty as a common carrier under the Interstate Commerce Act is to make certain that the applicable fares are collected." *Alexandria, Barcroft & Washington Fares Between the District of Columbia & Virginia*; 48 M.C.C. 613, 626 (1948).

**The Transportation Act of 1940
Gives No Authority to Deduct
for Unreasonableness**

The body of fundamental law just set forth in applicable whether the transportation service is rendered to the United States or to a private person. Section 321 of the Transportation Act of 1940 requires the United States to pay "the full applicable commercial rates" for the transportation service rendered it by a common carrier subject to the Interstate Commerce Act unless special contracts are entered into pursuant to Section 22 of that Act, which was not done here. Section 322 requires the United States to pay for transportation service by common carriers "upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office", but reserves the right in the United States "to deduct the amount of any overpayment to

any such carrier from any amount subsequently found to be due such carrier." (Emphasis supplied).

This Court, in *U. S. v. N. Y., N. H. & Hartford R. R.*, 78 S. Ct. adv. 212, considered in detail the history of Section 322 of the Transportation Act of 1940. Prior to its adoption the United States "protected itself against transportation overcharges by not paying transportation bills until the responsible government officers, and, in doubtful cases, the General Accounting Office, first audited the bills and found that the charges were correct." 78 S. Ct. at p. 214.

"[T]he Congress was desirous of aiding the [carriers] to secure prompt payment of their charges, but it is also clear that the Congress, and the [carriers], contemplated that the Government's protection against *overcharges* available under the preaudit practice should not be diminished. The burden of the carriers to establish the correctness of their charges was to continue unabridged. The carriers were to be paid immediately upon submission of their bills but the carriers were in return promptly to refund *overcharges* when such charges were administratively determined. The carrier would then have 'to re-collect' the sum refunded by justifying its bills to the agency or by proving its claim in the courts." 78 S. Ct. at p. 216. (Emphasis supplied).

To assure compliance by carriers with their obligation to refund overcharges "administratively determined," Section 322 conferred on the "United States Government" authority "to deduct the amount of any overpayment" from other amounts due them. Obviously the key to the reach of this authority is the meaning of the word "overpayment". We submit that what is an overpayment by a shipper is necessarily

an overcharge by a carrier. The two are correlative terms. Therefore, that which is not an overcharge is not an overpayment. Section 204a(5) of the Interstate Commerce Act specifically defines overcharges by a motor carrier "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." This is the identical definition of overcharges by a rail carrier made in Section 16(3)(g) of the Act. Thus, Section 322 of the Transportation Act of 1940, read as it must be with Sections 16(3)(g) and 204a(5) of the Interstate Commerce Act, defines an overpayment to exclude a payment of charges properly and accurately computed on applicable rates.

The Congress reiterated and made explicit this definition of the word "overpayment" at its last Session. Public Law 85-762, 85th Cong., S. 377, approved and effective August 26, 1958. This Law amends the Interstate Commerce Act, *inter alia*, to impose a statute of limitations of three years for the institution of proceedings by the United States to recover freight charges from any common carrier subject to the Act. It also amends Section 322 of the Transportation Act of 1940 to require that deductions of overpayments by the General Accounting Office be made within three years except in time of war, and to require that claims to the General Accounting Office by carriers be filed within three years except in time of war. To make crystal clear that the General Accounting Office cannot make deductions to recover charges based on allegedly unreasonable applicable rates the words "overcharge by" are substituted for the words "overpayment to" in Section 322 so that it now authorizes "the United States Government to deduct the amount of any over-

charge," defined in the Section to mean, insofar as relevant here, "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission." Thus the Congress has confirmed and put within the four corners of Section 322 of the Transportation Act of 1940 its command that the General Accounting Office deduct only charges in excess of those payable on applicable rates.*

In the light of the foregoing, we submit that Section 322 of the Transportation Act of 1940 does not authorize deduction on the ground that the General Account-

* Section 322 now reads in its entirety as follows:

"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharge by any such carrier from any amount subsequently found to be due such carrier. The term 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of the Interstate Commerce Act."

Provided, however, That such deductions shall be made within three years (not including any time of war) from the time of payment of bills; Provided further, That every claim cognizable by the General Accounting Office for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Accounting Office within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later."

ing Office thinks applicable rates unreasonable. That this Court so interprets Section 322 is implicit in the opinion in the *New Haven* case. The Court uses the terms "overcharge" and "overpayment" interchangeably. It refers to the duty of carriers "promptly to refund overcharges" that have been "administratively determined", referring to the determinations made by "the responsible government officers" or the General Accounting Office. Again, it speaks of the carriers' burden of proving the "correctness of their charges", either to "the agency" or "in the courts".

All of this is absolutely inconsistent with a right in the Government to recoup charges properly and accurately computed on applicable rates unless the Interstate Commerce Commission has first (1) found those rates unreasonable and (2) prescribed reasonable rates in lieu of them. As was said in *Montana-Dakota*, 341 U.S. at p. 251:

"Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high . . . To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."

Thus, neither the "responsible government officers" nor the General Accounting Office can "administratively determine" rate reasonableness. Nor can the courts determine it. Therefore, the reasonableness of the carriers' rates cannot be part of their burden of proving "the correctness of their charges".

Respondent does not claim here that Petitioner's charges were not correct, i.e., not properly and accu-

rately computed on filed and applicable rates. In these circumstances the General Accounting Office had no authority to deduct them from other amounts due Petitioner*. That Office having unlawfully deducted them, Petitioner had a right "to re-collect" them in court. This was the right the judgment of the District Court vindicated. The Court of Appeals, in reversing that judgment, in effect interprets Section 322 as repealing the Interstate Commerce Act *pro tanto* by giving the General Accounting Office the prerogative of "administratively determining" rate reasonableness. This is a prerogative that not even the Interstate Commerce Commission has. It can determine rate reasonableness only in accord with the specific procedures prescribed by the Congress in the Interstate Commerce Act and the Administrative Procedure Act to assure a full and fair hearing and findings supported by substantial evidence.

Finally, the effect of reversing Petitioner's judgment for its charges is to vitiate Section 321 of the Transportation Act of 1940, i.e., to relieve Respondent from its obligation under that Section to pay "the full applicable commercial rates, fares, or charges" for transportation service rendered it by common carriers subject to the Interstate Commerce Act. Under the holding of the Court of Appeals the General Accounting Office can "administratively determine" that applicable rates are unreasonable and force refund of charges based on them. The carrier must then either bring suit or give up. If he brings suit he must not only prosecute his claim in court but in a proceeding

* This distinguishes the deductions here from those in the *Western Pacific Case*. As we've shown, *supra*, p. . . ., the Government there claimed that the charges deducted were computed on inapplicable rates.

before the Interstate Commerce Commission, where, under the rule of the *New Haven* Case, he presumably has the burden of proving that rates filed with and accepted by the Interstate Commerce Commission are reasonable—a burden that is not his under the Interstate Commerce Act. Faced with this prospect, and since deductions based on charges by any particular carrier computed on any particular rate are ordinarily small, e.g., \$18.34 in this case, the carrier usually has to give up. The practical result is that, as far as transportation for the United States is concerned, the General Accounting Office has assumed the rate regulatory function of the Interstate Commerce Commission.

CONCLUSION

For the reasons set forth in this Brief, Davidson Transfer & Storage Co., Inc., prays that the judgment of the Court of Appeals be reversed and the cause remanded to it with directions to re-instate the judgment of the United States District Court for the District of Columbia.

Respectfully submitted,

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Dated: DECEMBER 10, 1958

APPENDIX A**Statutes Involved**

The relevant portion of Section 316 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 558, 49 U.S.C.A. Sec. 316(e), (g) and (j) provides:

“(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. Whenever, after hearing, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by railroad and/or express, land/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective.

“(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal

pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation; or practice, and pending such hearing and the decision thereon the Commission by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare or charge, or classification, rule, regulation or practice, shall go into effect at the end of such period. * * *

“(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

The relevant portion of Section 217 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 560, 49 U.S.C.A. See. 317(a), (b), and (c) provides:

“(a) “Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation; and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier. * * *”

“(b) “No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the

time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extended to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: Provided, That the provisions of Sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

"(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

The relevant portion of Section 222 of Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 564, 49 U.S.C.A. Sec. 322(b) and (c), provides:

"(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; ***"

"(e) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who . . . shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, . . . shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than \$500 for the first offense and not more than \$2,000 for any subsequent offense."

The relevant portion of Section 204a of Part II of the Interstate Commerce Act, June 29, 1949, c. 272, 63 Stat. 280, 49 U.S.C.A. Sec. 304a(5), provides:

"For recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

"The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

The relevant portion of Section 15 of Part I of the Interstate Commerce Act, as amended February 28, 1920, c. 91, 41 Stat. 486, 49 U.S.C.A. Sec. 15(7) provides;

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the in-

tered carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may be further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. * * *

The relevant portion of Section 16 of Part I of the Interstate Commerce Act, as amended June 7, 1924, c. 325, 43 Stat. 633, September 18, 1940, c. 722, 54 Stat. 913, provides:

"All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues; and not after, subject to subdivision (d) of this paragraph.

"For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice."

"The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission."

Section 322 of the Transportation Act of 1940, September 18, 1940, c. 722, 54 Stat. 955, 49 U.S.C.A. Sec. 66, provides:

"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

APPENDIX B

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 20th day of July, A. D. 1953.

INVESTIGATION AND SUSPENSION DOCKET

NO. M-3929

SURCHARGES—NEW YORK STATE

NO. MC-C-1339

SURCHARGES—NEW YORK STATE

It appearing, That in Investigation and Suspension Docket No. M-3929, by orders entered October 5, 1951, and later, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the schedules described in said orders, and suspended the operation of such schedules to May 8, 1952, when they became effective;

It further appearing, That in No. MC-C-1339, by order dated October 26, 1951, the Commission instituted an investigation into and concerning the reasonableness and lawfulness otherwise of the surcharges described in such order;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that the Commission, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents in I. & S. No. M-3929 be, and they are hereby, notified and required to cancel the proposed schedules on or before September 4, 1953, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner

prescribed by the Commission under section 217 of the Interstate Commerce Act.

It is further ordered, That the respondent in No. MC-C-1339, Mathews Trucking Corporation, be, and it is hereby, notified and required to cancel the surcharges under investigation, on or before September 4, 1953, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act.

And it is further ordered, That these proceedings be, and they are hereby, discontinued.

By the Commission.

/s/ GEORGE W. LAIRD
Acting Secretary

APPENDIX C

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of August, A. D., 1953.

INVESTIGATION AND SUSPENSION DOCKET

NO. M-3929

SURCHARGES—NEW YORK STATE

NO. MC-C-1339

SURCHARGES—NEW YORK STATE

Upon further consideration of the record in the above-entitled proceedings and upon consideration of petitions by Motor Carriers Tariff Bureau, Inc., Central States Motor Freight Bureau, Inc., and Middle Atlantic Conference for postponement of the effective date of the Commission's order of July 20, 1953, and of a reply to the petitions by The Port of New York Authority, and good cause appearing therefor:

It is ordered, That the said order of July 20, 1953, which requires the cancellation of the surcharges under investigation, including the proposed schedules, on or before September 4, 1953, upon not less than one day's notice, be, and it is hereby, modified so as to postpone the effective date thereof to October 15, 1953, upon one day's notice;

And it is further ordered, That the said petitions, in all other respects, be, and they are hereby, denied for the reason that petitioners have not set forth reasons sufficient to warrant postponement of the effective date beyond October 15, 1953.

By the Commission.

/s/ GEORGE W. LAIRD

Acting Secretary

(SEAL)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. 96

DAVIDSON TRANSFER & STORAGE COMPANY, INC.
Petitioner

v.

UNITED STATES OF AMERICA

Respondent

No. 68

T. I. M. E., INC.

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

REPLY BRIEF FOR PETITIONERS

RESPONDENT'S THEORY OF A SHIPPER'S RIGHT TO
REPARATIONS

The theory of Respondent's Brief on the first question presented to the Court is that the Motor Carrier Act, Part II of the Interstate Commerce Act, codified and "converted . . . into a federal cause of action" (R. Br., p. 19) the common law tort of charging an unreasonable rate for common carriage, or, alternatively,

preserved the common law tort as such, together with the common law remedy.

A SHIPPER HAS NO STATUTORY RIGHT OR REMEDY

Let us examine Respondent's first alternative. It is grounded on the requirement in Section 216(b) that rates and charges be just and reasonable. This Section, Respondent says, creates a duty on carriers and a right in shippers. Invoking the old saw that where there's a right there's a remedy, Respondent argues that the Congress must have contemplated that a shipper have redress in damages for the charging of an unreasonable rate.

The Contrast Between Parts I and III and Part II of the Act

The difficulty with this is that Part II of the Interstate Commerce Act, in contrast to Part I, deliberately forecloses such redress. Part I specifically creates a cause of action against a railroad for violation of its provisions and prescribes the remedies for its enforcement. Thus Section 8 provides that if "any [railroad] subject to the provisions of this part shall do, cause to be done, or permit to be done any act . . . prohibited or declared to be unlawful . . . such [railroad], shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation . . . , together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery" Section 9 provides that "any person or persons claiming to be damaged by any [railroad] subject to the provisions of this part may either make complaint to the Commission [pursuant to Section 13(1)] or may bring

suit in his or their own behalf for the recovery of the damages . . . in any district . . . court of the United States of competent jurisdiction . . ." Section 16(1) provides that if, ~~after~~ hearing on a complaint . . . the Commission determines that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay . . ." Section 16(2) provides that if the carrier "does not comply with an order for the payment of money within the time limit in such order, the complainant . . . may file in the district court . . . for the district in which he resides a complaint setting forth briefly the causes for which he claims damages and the order of the Commission in the premises." Section 16(2)(b) provides that "complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues. . . ."

Part II of the Act, enacted on August 9, 1935, the same day on which all of the foregoing Sections of Part I were amended in various minor ways, contains no provisions comparable to them. ~~Its~~ only reference to private redress against motor carriers is found in Section 204a(2), enacted on June 29, 1949. That Section requires actions at law for the recovery of overcharges, defined in Section 204a(5) ~~to~~ exclude charges based on applicable rates, to be brought within two years of the time the cause of action accrues. On the other hand Part III of the Act, enacted in 1940 to bring certain common carriers by water within the regulatory jurisdiction of the Interstate Commerce Commission, contains provisions for private redress

that are the precise counterpart of those contained in Part I.¹

As Respondent says (R. Br., p. 18), "Congress was aware of these principles [adopted by it in the foregoing Sections of Part I of the Interstate Commerce Act] when it undertook to regulate interstate motor carriers and must be deemed to have acted in the light of them." We submit that the sharp contrast between Part I and Part II demonstrates that the Congress, acting in the light of them, chose not to make them applicable to motor carriers. Having, by Section 8 of Part I, specifically created a cause of action against rail carriers, it could not have intended its general requirement in Section 216(b) of Part II that rates be just and reasonable, which has its counterpart in Section 1(4) of Part I, to create a cause of action against motor carriers. As this Court said in *Montana*, that requirement creates a criterion for administrative action and not a justiciable legal right. 341 U. S. 246, 251.

**The Intent of the Congress as
Judicially Ascertained.**

Two related cases, the latter decided by the Supreme Court of Oregon on October 15, 1958, are very much in point. They are *Consolidated Freightways v. United Truck Lines*, 216 F. 2d 543 (C. A. 9th 1954), cert. den. 349 U. S. 905; *Consolidated Freightways v. United Truck Lines*, 330 P. 2d (adv.) 522, (S. Ct. Ore. 1958). In the first Consolidated brought suit in a United States District Court for damages against United. The

¹ The absence of provisions for private redress in Part II and the presence of such provisions in Part III is noted in the compilation of the Interstate Commerce Act and Supplementary Acts made and printed as of November 1, 1951, pursuant to Senate Resolution 205, 82nd Congress, 1st Sess., S. Doc. 72.

gravamen of the complaint was that United had been engaged as a common carrier by motor in the transportation of property in interstate commerce without a certificate of public convenience and necessity from the Interstate Commerce Commission in violation of Section 206 of Part II of the Interstate Commerce Act. The District Court dismissed the suit on the ground that there was no diversity of citizenship between the parties and no federal question presented. The Court of Appeals affirmed. In so doing it held:

“. . . Part II makes provision only for criminal penalties and injunctive remedies to be sought by the Commission. In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as a wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself.” 216 F. 2d at p. 545.

Thereafter Consolidated brought suit for damages against United in a state court in Oregon alleging that the latter's operations in violation of the Interstate Commerce Act constituted the common law tort defined in the Section 710 of the Restatement of Torts as follows:

“Section 710. Engaging in Business in Violation of Legislative Enactment.

“One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,

“(a) one of the purposes of the enactment is to protect the other against unauthorized competition, and.

“(b) the enactment does not negative such liability.”

The Supreme Court of Oregon, in an exhaustive and well reasoned opinion, held that the suit would not lie. First treating with the plaintiff's burden to establish that “one of the purposes of the Motor Carrier Act is to protect a certificate holder from unauthorized competition” the Court held:

“... It is our opinion that incidental to the objective of the Motor Carrier Act to protect the public from the harm arising out of unregulated competition was the intention to protect a certificate holder from unauthorized competition and that the plaintiff would be entitled to recover under the principle stated in Section 740 of the Restatement of Torts if the Motor Carrier Act does not negative liability. . . .” 330 P. 2d at p. 523.

The Court then went on to consider whether the plaintiff had established that the Motor Carrier Act does not negative liability.² It pointed out that Section 8 of Part I and Section 322(b) of Part III of the Act make rail and water carriers, respectively, liable for violations of it “*to the person or persons injured thereby for the full amount of damages sustained.*”

In contrast, said the Court, Section 222(b) of Part II merely provides that if “any motor carrier or broker operates in violation of [it] *the Commission or its duly authorized agent may ap-*

² It is to be noted that the burden of going forward with evidence and the burden of persuasion on this issue is on the party asserting the right—the plaintiff in *Consolidated* and the Respondent here.

ply to the District Court of the United States where such motor carrier or broker operates" for enforcement. 330 P. 2d at p. 524. (Emphasis the Court's). In this connection the Court noted that Part II as enacted in 1935 was an amended version of HR 6836, introduced as the Rayburn Bill in 1934, which earlier bill had given not only the Commission but also "any party injured" by violations of it a right of action.

Concluding that the private cause of action created in Parts I and III of the Interstate Commerce Act was not "unwittingly omitted" from Part II, and that "the Congress intended to vest in the Interstate Commerce Commission the sole authority to enforce the provisions of the Act, precluding private relief in both federal and state courts either by way of injunction or damages," 330 P. 2d at p. 529, the Court went on to explain why. It emphasized that the legislative history of Part II makes clear "that the regulation of motor carriers was regarded as presenting problems not involved in the regulation of rail and water transportation."

"... In the reports of the Congressional hearings there are frequent references to the chaotic condition of motor carrier transportation, chiefly resulting from the fact that at the time the proposed Act was being considered there were over 200,000 trucks in operation, 40,000 of which were operated by approximately 10,000 common carriers. In testifying before the Committee on Interstate and Foreign Commerce of the House of Representatives, Joseph B. Eastman, then Federal Coordinator of Transportation, stated:

"While I am confident that regulation will prove practicable, I also realize the difficulties which will be encountered. In order to meet that, the Commission, in the course of its regulations, will have to feel its way along and be guided by

experience as it goes on, and changes in the law may prove necessary because of that experience.' Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on HR 5262 and HR 6016 (1935) page 29.

"There was ample reason for vesting in the Interstate Commerce Commission exclusive control over the regulation of motor carrier transportation, including the pre-emption of the remedies for violation of the Motor Carrier Act. The variety of operations carried on by large and small contract carriers, common carriers and carriers for hire on overlapping routes under licenses varying in scope, presented unique problems of regulation. At the outset at least it would seem necessary to have some unified and exclusive control in an administrative body in order that the conflicts arising out of the chaotic condition of the industry could be resolved on a systematic and sensible basis. . . ." 330 P. 2d at p. 528.

It is to be remembered, and this Court can take judicial notice of the fact that the most serious result of this chaotic condition—10,000 motor carriers competing with one another in the middle of the Great Depression—was that rates were being steadily forced down. Thus the problem in the motor carrier industry, as in virtually every other industry, was not to protect buyers from unreasonably high rates but to protect sellers from unreasonably low rates.³ As Respondent says in Footnote 9 on Page 25 of its Brief: "The bill's proponents hoped that regulation of rates would *raise* them from the uneconomic levels at which

³ Fierce competition and consequent destructive "rate wars" are still a major problem in the trucking industry. The vast bulk of the rate proceedings before the Interstate Commerce Commission are to keep rates from falling below the zone of reasonableness, not to keep them from rising above it.

they stood in 1935." (Emphasis supplied). Viewed in this perspective the deliberate withholding by the Congress of any right in shippers to reparations is entirely sensible and understandable.

A SHIPPER HAS NO COMMON LAW RIGHT OR REMEDY

Let us now examine Respondent's alternative theory, i.e., that Part II of the Interstate Commerce Act left intact as such the common law tort of charging an unreasonable rate, together with the common law remedy. Supplementing our demonstration of the unsoundness of this argument in our Main Brief, p. 19 *et seq.*, we submit that a fatal defect of this theory is that it overlooks the fact that an essential element of the tort is that the rate charged be unreasonable. As this Court said in *Montana*, 341 U. S. at p. 253, speaking of the fraudulent exaction of an unreasonable rate, the issue of reasonableness is not one severable from the issue of liability, "for the acts charged do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remedial fraud." So here, as there, the reasonableness of the rate is not only determinative on the issue of damages *vel non*, but on the issue of the commission of the tort *vel non*.

No Tribunal Can Determine the Reasonableness of Past Rates

It follows here, as it did in *Montana*, that no cause of action can exist unless some tribunal has authority to adjudicate the reasonableness of the rate charged. The law is clear, and Respondent concedes, that no court can adjudicate the reasonableness of the past rates of a common carrier by motor regulated by the Interstate Commerce Commission. Can the Commission do so? If not, a claim that such rates were un-

reasonable fails to state either a cause of action for damages or a defense sufficient in law to a suit by the carrier for charges based on such rates.

Respondent concedes that Part II of the Interstate Commerce Act grants the Commission no specific power to determine the reasonableness of the past rates of motor carriers. It therefore seeks, as did the Commission in *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M. C. C. 337, (1944), to infer the power from "the general powers expressly conferred upon [the Commission] in Sections 216(b), (d), (e), and 204(a)(6), (c), (d)." (R. Br., p. 31). Let us examine those Sections. Sections 216(b) and (d) grant the Commission no power. They merely make it the duty of carriers to establish, observe and enforce just and reasonable rates, charges, classifications and practices, and prohibit and declare unlawful unjust and unreasonable charges. Section 216(e) gives the Commission power to act prospectively only. It permits it to investigate, upon complaint or *sua sponte* rates, charges, classifications or practices "in effect or proposed to be put into effect." If after hearing it finds that any such rate, charge, classification or practice "is or will be" unjust or unreasonable it shall determine the rate or charge "thereafter to be observed" or the classification or practice "thereafter to be made effective."

Sections 204(a)(6), (c), and (d), are no more than statements of the general powers and duties of the Commission. Section 204(d) is irrelevant. It merely incorporates by reference the provisions of Section 14 of Part I requiring the Commission to make reports, and Section 16(13) making tariffs, etc., public records and *prima facie* evidence of what they purport to be.

Section 204(a)(6) makes it the duty of the Commis-

sion to "administer, execute and enforce all provisions" of Part II of the Act, and "to make all necessary orders in connection therewith." As for this Section, it is axiomatic that the imposition of a duty to administer a statute and to make necessary orders in so doing neither defines the function of the administrator nor confers any substantive authority on him. Much less does it vitiate specific limitations of authority contained in the statute, such as the limitation of the Commission's authority to determine the reasonableness of rates contained in Section 216(e).

Section 204(c) authorizes the Commission, upon complaint or *sua sponte*, to "investigate whether any motor carrier or broker has failed to comply with any provision of [Part II of the Act], or with any requirement established pursuant thereto." If it finds a failure it "shall issue an appropriate order to compel the carrier or broker to comply therewith." The Federal Power Commission is given equivalent authority in the Federal Power Act (Sections 306, 307(a), 309) and in the Natural Gas Act (Sections 13, 14(a) and 16).

This grant of general authority to the Interstate Commerce Commission to investigate violations of the law and to order compliance therewith no more gives it power to determine the reasonableness of past rates or to order reparations than do the similar grants of authority in the Power Act and the Gas Act give the Federal Power Commission such power. See *Montana*, *supra*, and *Hope Natural Gas Co. v. F. P. C.*, 134 F. 2d 287, 310 (C. A. 4th 1943). To hold that it does would be to hold that Sections 216(e) and 216(g), which grant specific and carefully defined powers over rates, are mere surplusage. It follows that Section 204(c) and Section 216 must deal with separate and

distinct matters. That they do can be easily demonstrated from the facts of the *Bell Potato Chip* Case. There was no question but that the rates in issue there were filed with and accepted by the Commission pursuant to Section 217 of the Act. Clearly the carrier was not violating the Act by collecting charges based on those rates. On the contrary, to use the Commission's language in that very case, a "carrier must adhere strictly to its filed tariffs, and departures and variations therefrom are forbidden." 43 M. C. C. at p. 341.

In other words, had the carrier acquiesced in the shipper's demand for refund it would have "failed to comply" with Section 217(b) of the Act, which forbids a carrier to deviate from filed rates or to "refund or remit in any manner or by any device . . . any portion" thereof. It would thereby have subjected itself to investigation under Section 204(e) upon the Commission's own motion, or upon complaint by any person. As the result of such an investigation the Commission would have been *required* to issue an order to compel it to adhere to its tariffs, for Section 204(e) provides that if the Commission "finds . . . that the motor carrier . . . has failed to comply with any such provision or requirement the Commission *shall* issue an appropriate order to compel" compliance. Certainly it would have been no defense that the filed tariff was thought to be unreasonable. Thus, in relying on Section 204(e), the *Bell Potato Chip* Case makes the startling holding that the Commission's power in Section 204(e) to compel adherence to filed tariffs is the power to justify, indeed effectively to compel, an illegal departure from filed tariffs.

The only rational interpretation of Section 204(e) is that it, like the comparable sections of the Power

Act and the Gas Act, is one means of assuring compliance by carriers with those duties imposed by the Act in the performance of which there is no element of discretion, such as there is in the determination whether particular rates are reasonable. The other means is Section 222(b), which permits the Commission to apply to a federal district court for enforcement of any duty of any motor carrier or broker "*except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof.*" (Emphasis supplied).

The Commission's Various Rationales of Its Alleged Authority

The fact is that neither the Commission nor shippers have ever actually used Section 204(c). Complaints directed to the reasonableness of past rates are brought, considered and determined under Section 216(e). See the cases in the Commission cited at Footnote 12 on page 34 of Respondent's Brief. Although, as we have seen, Section 216(e) provides only for (1) complaints directed to existing or proposed rates; (2) findings on existing or proposed rates with prospective force, and (3) orders prescribing rates thereafter to be observed, the Commission justifies the determination of the reasonableness of past rates under it on the theory that "a necessary part of [its] power to prescribe rates for the future [is] authority to examine the entire rate situation under consideration and determine what rates were applicable and lawful on past shipments when that issue is raised." *Enamel Co. v. Cushman*, 11 M. C. C. 365, 367 (1939). This theory had perhaps a scintilla of plausibility in cases in which a complaint to the Commission alleged that rates in effect at the time it was filed were unreasonable in the past and would be unreasonable in the future. However, it

was rejected even in that situation in *Hope Natural Gas Co. v. F. P. C.*, *supra*. In any event, it was obviously useless in cases where only the reasonableness of past rates was in issue. Nevertheless, it was adopted in such cases. See *Kingan and Co. v. Olson Trans. Co.*, 32 M. C. C. 10 (1942). It was not until the *Bell Potato Chip* Case in 1944, in which the Commission's attention was called to the *Hope* Case, that it sought to broaden the base of its alleged authority by invoking Section 204(e). We have shown that reliance on this Section is misplaced.

Judicial review of the *Bell* Case was not sought and the Commission's authority was not again seriously challenged in Court or Commission until *U. S. v. Davidson*, 302 F. 2d 87 (1958). In that case Davidson brought suit against Respondent in the United States District Court for the District of Columbia for its charges. Respondent defended on the ground that the rates on which the charges were computed were unreasonable and simultaneously filed a complaint with the Commission under Section 216(e) of Part II of the Act. Davidson moved to dismiss the complaint for want of authority in the Commission to entertain it. An Examiner of the Commission recommended that the motion be granted. On exceptions to his Report the Commission in effect admitted that under the *Montana* holding it has no authority to entertain a complaint alleging that the past rates of a motor carrier were unreasonable unless "a cause of action to which the issue of reasonableness is subsidiary is maintainable in the court in which it is brought." It then went on, with three Commissioners dissenting, to misinterpret *Montana* as Respondent misinterprets it here, i.e., as holding only that a complaint for damages for the

charging of allegedly unreasonable rates states no federal cause of action.

Taking the view that the issue of the past reasonableness of Davidson's rates was subsidiary to its suit for its charges, the Commission concluded that it could entertain a complaint that those rates were unreasonable. In so doing it said that "it is not our province to pass on the ultimate questions of whether complainant or defendant in the present proceeding would prevail in the pending court action." A strange statement indeed since the only issue joined by the answer to Davidson's suit was the reasonableness of the rates on which its charges were based.⁴

Thus the Commission has in effect abandoned the rationale of the *Bell Potato Chip* case, i.e., that Part II of the Interstate Commerce Act gives it independent authority to determine the reasonableness of the past rates of motor carriers. It now says that it has authority as a "collaborative instrumentality of justice" with the courts. It therefore now holds that absent unusual circumstances, the pendency of a suit timely filed in a court of competent jurisdiction "is a condition precedent to our entertainment of a complaint alleging unreasonableness, unjust discrimination, or undue prejudice in the past." *Schenksler, Trustee v. Ellis Trucking*

⁴ The Commission's denial of the motion to dismiss is now on review in the United States District Court for the District of Maryland, by way of suit for injunction brought pursuant to Section 1336 of the Judicial Code. *Davidson Transfer & Storage Co. v. U. S. and I. C. C.*, Civil No. 10433. On August 15, 1958, Chief Judge Thomsen denied the Commission's motion to dismiss the suit for lack of jurisdiction grounded on the theory that its finding that the rates in issue were unreasonable was a purely advisory one made to aid the Court in resolving the issue of reasonableness raised by Respondent as a defense to Davidson's suit for its charges. Thereafter Chief Judge Thomsen stayed further proceedings pending this Court's disposition of the instant case.

Co., 302 I. C. C. 701 (1958).⁵ Moreover, it frankly recognizes that in entertaining such complaints it is acting in a judicial capacity. *National Distillers and Chemical Corp. v. Helm's Express, Inc.*, No. 32384, is a proceeding on a complaint seeking a determination of the reasonableness of the past rates of a motor carrier. On December 15, 1958 the Commission denied intervention to two associations of motor carriers making and publishing rates and classifications related to those under attack pursuant to agreements approved by the Commission under the Bulwinkle Act. (49 U. S. C. A. § 5a), "for the reason that this proceeding is an adversary proceeding to determine private rights . . ." As we have heretofore shown, the Commission has no judicial authority under Part II of the Interstate Commerce Act.

THE CONGRESS HAS NOT ADOPTED RESPONDENT'S MISINTERPRETATION OF THE FACT

Respondent seeks comfort in its claim that the Congress "is fully aware of the doctrine of *Bell Potato Chip, supra*, and has not seen fit to change it." (R. Br., p. 33, fn. 11). In short it invokes the theory of legislative acquiescence—that silence is assent. One who would carry his burden of proof on this theory has a heavy burden indeed. In the law of evidence silence is deemed to be assent only when no other explanation is equally consistent with silence. See 4 Wigmore, Evidence (3rd ed. 1940) 70. In *Helvering v.*

The Commission has not defined its phrase "unusual circumstances." However, the fact that the complainant in *Schensker* was a Trustee in Bankruptcy charged with ascertaining assets was held not to be a sufficiently unusual circumstance to justify it in entertaining the complaint, the object of which was to determine whether the bankrupt's assets included money paid for freight charges based on unreasonably high rates.

Hallock, 309 U. S. 106, 119 this Court said: "It would require very persuasive circumstances to debar this Court from re-examining its own doctrines"—to say nothing of correcting the errors of lower courts. This statement was quoted with approval in *Girouard v. U. S.*, 328 U. S. 61. Holding that the enactment of the Nationality Act of 1940 was not Congressional adoption of erroneous constructions of earlier acts made by this Court, Mr. Justice Douglas said:

"We are met, however, with the argument that even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, in 1940 when the new Naturalization Act was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the Schwimmer, Macintosh, and Bland cases. Cf. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 488, 489, 60 S. Ct. 982, 989, 990, 84 L. Ed. 1311, 128 A. L. R. 1044.

... "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the Schwimmer, Macintosh and Bland cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases. . . ."

The objections to finding legislative intent from the absence of legislative action are well summarized in the opinion of the late Justice Rutledge in *Cleveland v. U. S.*, 329 U. S. 14, 22:

"Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments. See *Girouard v. United States*, 328 U. S. 61, 66 S. Ct. 826. It is perhaps too late now to deny that, legislatively speaking as in ordinary life, silence in some instances may give consent. [Footnote omitted]. But it would be going even farther beyond reason and common experience to maintain, as there are signs we may be by way of doing, that in legislation any more than in other affairs silence or nonaction always is acquiescence equivalent to action.

"There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated [Footnote omitted] and in the clarity and certainty of the expression of its will. [Footnote omitted]. And there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. See *Moore v. Cleveland R. Co.*, 6 Cir., 108 F. 2d 656, 660. At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors, see *Girouard v. United States*, supra, 328 U. S. 69, 66 S. Ct. at page 830, as they ought to do when experience has confirmed or demonstrated the errors' existence.

"The danger of imputing to Congress, as a result of its failure to take positive or affirmative action through normal legislative processes, ideas entertained by the Court concerning Congress' will, is illustrated most dramatically perhaps by the vacillating and contradictory courses pursued in the long line of decisions imputing to 'the silence of Congress' varied effects in commerce clause cases. [Footnote omitted]. That danger may be and often is equally present in others. More often than not the only safe assumption to make from Congress' inaction is simply that Congress does not intend to act at all. . . ."

Apart from the fact that the silence of one Congress on a statute permits only a guess as to the intent of the earlier Congress which enacted it, we submit that sound principle forbids the use of legislative history at all where, as here, the statute is clear and unambiguous. As the late Justice Holmes said, "we do not inquire what the *legislature* meant, we ask only what a *statute* means." Quoted by the late Justice Jackson in an address to the American Law Institute, 34 A. B. A. Journal 535, 537. This Court, not the Congress, is the arbiter of the meaning of the statutes of the United States. As such it has the duty to correct misinterpretations of them by inferior tribunals. To refuse to do so here would be to treat the silence of the Congress as the exercise by it of a responsibility which it does not have.

CONCLUSION

In sum the matter comes to this: No court can adjudicate Respondent's claim that it was charged unreasonable rates in the past because no court can determine the reasonableness of the rates of a common carrier by motor regulated by the Interstate Commerce

Commission. The Interstate Commerce Commission cannot adjudicate Respondent's claim because its authority is only the legislative power to fix rates for the future. The inevitable consequence is that there is no legal right in a shipper to any rate other than the rate filed and effective at the time the transportation is performed. Respondent can no more escape this consequence than one can pull himself up by his own bootstraps. In law two minuses do not make a plus. The absence of authority in the Commission cannot be coupled with the absence of authority in the Court to create authority in both.

Respectfully submitted,

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